Supreme Court, U. S.
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In The

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-1198

NOLDE BROTHERS, INCORPORATED,
Petitioner,

vs.

LOCAL NO. 358, BAKERY & CONFECTIONERY WORKERS UNION, AFL-CIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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In The

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No. _____

NOLDE BROTHERS, INCORPORATED,
Petitioner,

vs.

LOCAL NO. 358, BAKERY & CONFECTIONERY WORKERS UNION, AFL-CIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Nolde Brothers, Incorporated (the Company) respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Fourth Circuit Court of Appeals is not reported; the opinion is attached hereto, Appendix A, pp. A1 to A22. The opinion of the Court of Appeals denying the Company's petition for rehearing and suggestion for rehearing en banc is attached here-

to, Appendix B, p. A23. The opinion of the District Court for the Eastern District of Virginia is reported at 382 F.Supp. 1354, 87 LRRM 2646 (E.D. Va. 1974) and is attached hereto, Appendix C, pp. A24 to A33. The Court of Appeals' order denying the Company's motion for stay of mandate and the District Court's order on remand are attached as Appendices D (p. A34) and E (pp. A35-A36), respectively.

JURISDICTION

The date of the judgment and entry of judgment to be reviewed is October 23, 1975. The Company's timely petition for rehearing and suggestion for rehearing en banc was denied on November 26, 1975. This petition for certiorari was timely filed within 90 days of that date. Jurisdiction of this Court is invoked under 28 USC §1254(1).

QUESTION PRESENTED

Is an employer required to arbitrate a dispute between the employer and a union where the dispute did not arise until after the union terminated the parties' agreement to arbitrate, notwithstanding the United States Supreme Court's ruling that no obligation to arbitrate a labor dispute arises solely by operation of law?

STATEMENT OF THE CASE

The Company and Respondent, Local No. 358 Bakery & Confectionery Workers International Union (the Union) were parties to a collective bargaining contract entered into on July 28, 1970, which had an expiration date of July 21, 1973. The contract, which covered certain employees at the Company's Norfolk,

Virginia, bakery, was to remain in full force and effect after July 21, 1973 until a new agreement had been reached and executed, or until either the Union or the Company terminated the agreement by giving seven days' written notice to the other. The contract included a provision concerning severance pay and a provision establishing a mandatory grievance-arbitration procedure.[1]

On May 16, 1973 the Union advised the Company pursuant to §8(d) of the National Labor Relations Act (29 USC §158[d]) that it wished to negotiate certain changes in the existing contract. The parties negotiated for approximately three months. In a letter to the Company dated August 20, 1973, the Union terminated the contract as of August 27, 1973. At a bargaining session held August 31, 1973, the Union rejected the Company's last offer and stated that it would strike unless the Company agreed to the Union's proposals. The Company thereupon said that it would permanently close its Norfolk bakery and did permanently cease operations at that bakery on August 31, 1973.

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1. 1. Article IX. Wages.

. . .

Section 5. Each full-time employee who is permanently displaced from his employment with the Company by reason of the introduction of labor saving equipment, the closing of a department, the closing of an entire plant, or by lay off, shall be compensated for such displacement providing he has been actively employed by the Company for a period of at least three (3) years. An eligible employee's compensation for his displacement shall be on the basis of thirty (30) hours of severance pay, at his straight time hourly rate, for each full year or major portion of a year of active employment commencing with the fourth (4th) year following his most recent date of hire. Payment under this formula shall be limited to a maximum of nine hundred (900) hours of severance pay.

Subsequent to the plant closing and after the date the Union had terminated the contract, the Union made a demand for severance pay and further demanded that the Company arbitrate the issue as to whether the released employees were entitled to severance pay. The Company refused the Union's claim for severance pay and refused to arbitrate the issue of whether the employees were entitled to severance pay. The Company's position was that both the right to severance pay and the duty to arbitrate were solely creatures of the contract which earlier had been terminated by the Union.

The Union then instituted this action in the District Court to compel arbitration of the severance pay

(Footnote Continued)

2. Article XII. Grievances and Arbitration.

Section 1. All grievances shall be first taken up between the Plant Management and the Shop Steward. If these parties shall be unable to settle the grievance, then the Business Agent of the Union shall be called in, in an attempt to arrive at a settlement of the grievance. If these parties are unable to settle the grievance, the dispute will be settled as called for in Sections 2 and 3 of this Article.

Section 2. In the event that any grievance cannot be satisfactorily adjusted by the procedure outlined above, either of the parties hereto may demand arbitration and shall give written notice to the other party of its desire to arbitrate. No individual employee shall have the right to invoke arbitration without the written consent of the Union. The Arbitration Board shall consist of three (3) persons, one selected by the Company and one selected by the Union. The two persons selected shall agree upon a third person who shall act as Chairman of the Arbitration Board.

Section 3. The decision or award of the Arbitration Board, or a majority thereof, shall be final and binding on both parties. If the third party to arbitration is not selected in ten (10) days from receipt of notice, the Director of the U. S. Conciliation Service shall be requested to make the appointment. The expense of the neutral arbitrator shall be borne equally by the parties.

Section 4. Pending negotiations or during arbitration there shall be no strikes, lock-outs, boycotts, or any stoppages of work.

issue which arose after the Union terminated the agreement to arbitrate or, in the alternative, for an award of severance pay.[2] On the parties' motions for summary judgment, the District Court held that the Union's voluntary termination of its collective bargaining contract (including the arbitration agreement) with the Company destroying any right to severance pay created by the collective bargaining contract and any duty to arbitrate the severance pay issue had ended when the Union terminated the contract and the arbitration agreement contained therein. After timely appeal, the Court of Appeals for the Fourth Circuit reversed the judgment of the District Court and held that the severance pay dispute should be submitted to arbitration even though the parties' agreement to arbitrate had expired. Each member of the three-judge panel wrote a separate opinion, one judge dissenting in part.

REASONS FOR GRANTING THE WRIT

I. The Fourth Circuit's Decision Is In Conflict With Applicable Decisions Of This Court

A. The Fourth Circuit's Decision Contravenes The Rulings Of This Court That The Duty To Arbitrate Is A Creature Of Contract And Cannot Arise Solely By Operation Of Law

The Fourth Circuit's decision would compel the Company to submit to arbitration a dispute with the Union where, at the time the dispute arose, the Union and the Company were not parties to any effective arbitration agreement. There is absolutely no question in this case that the parties were not subject to an arbitra-

2. The District Court had jurisdiction of the action under 29 USC §185.

tion agreement at the time the severance pay dispute arose. The Fourth Circuit's decision would create, as a matter of law, an "agreement" to arbitrate disputes between parties arising after any agreement to arbitrate disputes between them had been unqualifiedly terminated by the same party demanding arbitration.

This Court has recognized time and time again that, while arbitration is a favored mechanism for the resolution of labor disputes, arbitration is a voluntary procedure and is solely a creature of contract. In *Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368, 374 (1974), the Court stated:

> "No obligation to arbitrate a labor dispute arises solely by operation of law. The law compels a party to submit his grievance to arbitration only if he has contracted to do so."

Thus, in *Operating Engineers, Local 150* v. *Flair Builders, Inc.*, 406 U.S. 487, 491 (1972), the Court held that before parties can be ordered to arbitrate the issue of whether laches bars the processing of a grievance, a court must first find that "the parties are subject to an agreement to arbitrate" or that "union and employer have agreed to arbitration." In these and other cases, this court has stated that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). In other words,

> "just as an employer has no obligation to arbitrate issues which it has not agreed to arbitrate, so *a fortiori*, it cannot be compelled to arbitrate if an arbitration clause does not bind it at all." *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 547 (1964).

This Court has made clear that the duty to arbitrate exists only if the parties are bound at the time the dispute arises by a collective bargaining contract requiring them to submit disputes to arbitration. The Fourth Circuit has plainly failed to apply these rulings of this Court in ordering the Company to arbitrate a matter which arose after the expiration of the contract in which there was a grievance-arbitration clause. This case presents the situation where all parties agree that, at the time the dispute arose, the agreement to arbitrate had been terminated; yet the Court of Appeals nevertheless ordered the parties to arbitration.

B. The Fourth Circuit's Decision Is Directly Contrary To This Court's Rulings Requiring Federal Labor Policy To Be Consistent With Policies Expressed By Congress

In addition to decisions of this Court cited above, the Fourth Circuit's decision is in conflict with this Court's clear instructions that:

> "It would be plainly inconsisitent with [*Textile Workers* v. *Lincoln Mills*, 353 U.S. 448 (1957)] . . . to say that the basic policies found controlling in an unfair labor practice context may be disregarded by the courts in a suit under §301, and thus to permit the rights enjoyed by the new employer in a successorship context to depend upon the forum in which the union presses its claims." *Howard Johnson Company* v. *Detroit Joint Board, Hotel & Restaurant Employees*, 417 U.S. 249, 256 (1974) (footnote omitted).

In *Lincoln Mills*, the Court stated:

> "[T]he substantive law to apply in suits under §301 (a) is federal law which the court must fashion from the policy of our national labor laws [citation

> omitted]. The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will be in the penumbra of express statutory mandates. Some will lack express statutory sanctions but will be solved by looking at the policy of legislation and fashioning a remedy which will effectuate that policy." *Textile Workers Union* v. *Lincoln Mills, supra,* 353 U.S. at 456-457.

Howard Johnson and *Lincoln Mills* clearly establish that the labor law policies enunciated by Congress are the touchstone of the development of the substantive body of general federal labor law in §301 actions.

In the instant case, if the Union had filed an unfair labor practice charge alleging that the Company had violated Section 8(a)(5) of the National Labor Relations Act by refusing to arbitrate a grievance arising after the expiration of the contract, the National Labor Relations Board would not have issued a complaint against the Company. *Hilton Davis Chemical Company,* 185 NLRB 241 (1970). Thus, in light of the Fourth Circuit's decision, the duty of a party to arbitrate disputes where the party is not subject to an agreement to arbitrate depends upon the forum (the Labor Board or the Fourth Circuit) in which the question is presented. The Labor Board—established by Congress to interpret, apply and enforce the nation's principal labor law—would hold that there is no duty to arbitrate after the agreement to arbitrate expires. The Fourth Circuit disagrees, notwithstanding *Lincoln Mills* and *Howard Johnson's* instruction to heed the

policies controlling in unfair labor practice contexts, as well as under other Congressional mandates.[3]

A writ of certiorari should issue because the Court of Appeals has rendered its decision in a way in conflict with applicable decisions of this Court as outlined in Parts IA and IB herein. Sup. Ct. Rule 19(1)(b).

II. The Decision Of The Fourth Circuit Court Of Appeals Is In Conflict With The Decisions Of Other United States Courts of Appeals

The Fourth Circuit's decision in this case is in conflict with the decisions of other United States courts of appeal and, accordingly, a writ of certiorari should be granted to review the decision. Sup. Ct. Rule 19(1)(b). In *IAM Local Lodge 2369* v. *Oxco Brush Division,* 517 F.2d 239 (6 Cir. 1975), the Sixth Circuit held that an employer could not be compelled to arbitrate a dispute concerning the employer's refusal to pay vacation pay to employees who had lost their jobs due to a plant closing where the dispute arose after the expiration of the labor contract and the mandatory arbitration provisions therein. The Sixth Circuit's opinion correctly interprets the doctrine established by this Court that arbitration is exclusively consensual in nature and cannot be compelled absent

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3. Indeed, the Fourth Circuit's opinion overrides the unambiguous Congressional statement that:

> "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an *existing* collective bargaining agreement." 29 U.S.C. §173(d). (Emphasis added)

The preference for dispute resolution through arbitration was never extended to situations in which the parties had not agreed to arbitrate.

the agreement of the parties.[4] To the same effect: *Local 998, UAW* v. *B & T Metals Co.*, 315 F.2d 432 (6 Cir. 1963).

In *OCAW International Union* v. *American Maize Products Company*, 492 F.2d 409, 412 (7 Cir.), cert. denied 417 U.S. 969 (1974), the Seventh Circuit held that a grievance "occurred after the termination of the agreement and was not arbitrable." The grievance alleged a lockout in breach of the labor contract. The union argued that the propriety of the employer's use of temporary replacements during the lockout was arbitrable, even if the union's contract termination notice allowed the employer to treat the no-lockout provision of the contract as expired. The Seventh Circuit rejected this claim holding that the termination notice was effective to terminate the contract and, accordingly, the grievance was not arbitrable because it involved employer conduct occurring after the contract expired. In the instant case, the Fourth Circuit would compel Petitioner to arbitrate even though the employer conduct underlying the grievance occurred after the termination of the contract.

Other Courts of Appeals' decisions in conflict with the Fourth Circuit's decision include:

1. *Milk Drivers Local No. 246* v. *Thompson's Dairy, Inc.*, 80 LRRM 3403, 3404 (D. D.C. 1972), *aff'd mem.* 489 F.2d 1272, 85 LRRM 2405 (D.C.

4. The Sixth Circuit correctly interpreted *Piano & Musical Instrument Workers Union* v. *W. W. Kimball Company*, 379 U.S. 357 (1964), as involving a situation where the grievance arose prior to the expiration of the contract. *IAM Local Lodge 2369* v. *Oxco Brush Division, supra*, 517 F.2d at 243. The Third Circuit and at least one of the opinions of the Fourth Circuit in this case have interpreted *Piano Workers* differently. *Local Lodge No. 595, IAM* v. *Howe Sound Company*, 350 F.2d 508, 511 (3 Cir. 1965).

Cir. 1974), where the District of Columbia Circuit affirmed the District Court's conclusion of law that:

> "Since the collective bargaining agreement between plaintiff and defendant had terminated prior to the time defendant went out of business, no dispute regarding severance pay could arise under the contract and as a matter of Law there could be nothing to arbitrate."

2. *Flight Engineers Int'l Assoc., EAL Chapter* v. *Eastern Air Lines, Inc.*, 359 F.2d 303, 309 (2 Cir. 1966), where the Second Circuit held:

> "we agree with the trial court that since the collective bargaining agreement between the parties had terminated, Eastern was no longer under any obligation to process as grievances the allegations of the union, or to maintain the System Board of Adjustment for the resolution of the claims here asserted by the Union."

See *Local 1251, UAW* v. *Robertshaw Controls Co.*, 405 F.2d 29 (2 Cir. 1968); *Procter & Gamble Ind. U.* v. *Procter & Gamble Mfg. Company*, 312 F.2d 181 (2 Cir. 1962), cert. denied 374 U.S. 830 (1963). *Ward Foods, Inc.* v. *Local 50, B&CW*, 360 F.Supp. 1310 (S.D. N.Y. 1973) (relying on *Flight Engineers Int'l Assoc.* v. *Eastern Air Lines, Inc., supra*, to hold that an employer could not be compelled to arbitrate a claim for severance pay arising after the termination of the labor contract).

3. *M.K. & O. Transit Lines, Inc.* v. *Division No. 892, Street, Electric Ry. and Motor Coach Employees*, 319 F.2d 488 (10 Cir.), cert. denied, 375 U.S. 944 (1963), where the Tenth Circuit held that the duty to arbitrate new terms and condi-

tions of employment which was expressly provided for in the prior labor contract expired when the union terminated the agreement.

The foregoing decisions of Courts of Appeal in the Second, Sixth, Seventh and Tenth Circuits are in conflict with the Fourth Circuit's decision that the Company must arbitrate a dispute which arose when there was no agreement requiring the Company to arbitrate any dispute. The Fourth Circuit attempted to distinguish the decisions of the other Courts of Appeal on the basis of the subject matter of the grievances involved. This purported basis for differentiation further highlights the error of the Fourth Circuit.

During the term of the labor contract, the Company and the Union agreed that "all grievances" could be submitted to arbitration. The Fourth Circuit characterized the arbitration clause as "all-encompassing" (p. A2, *infra*). The Fourth Circuit also said that the parties' agreement to arbitrate extends beyond the term of the contract. Yet, according to the decision, after the expiration of the contract, the agreement to arbitrate is not all-encompassing but extends only to certain issues. Putting aside for the moment the fact that there is no contractual basis for the Fourth Circuit's extension of the arbitration clause in perpetuity, the Company submits that the error of the decision is highlighted when the Fourth Circuit attempts to limit this perpetual extension of the contractual duty to arbitrate only to some issues, all in derogation of the parties' (expired) agreement as to the scope of the duty to arbitrate.

By the time the Fourth Circuit's reasoning reaches its ultimate judgment, the Fourth Circuit has imposed its own will on the parties as to when and what the

parties must submit to arbitration. In other words, to distinguish the decision of the other Courts of Appeal, the Fourth Circuit rewrote the parties' expired arbitration agreement to extend its duration, on the one hand, but to limit its scope, on the other hand. The Fourth Circuit, unlike the other referenced Courts of Appeal, has totally repudiated and destroyed the consensual nature of arbitration which is arbitration's fundamental characteristic and redeeming value as a labor-management dispute resolution procedure.

III. If The Court Believes That Its Decisions Have Not Resolved The Question Presented, A Writ Of Certiorari Should Issue Because The Question Presented Is An Important One

If the Court believes that the decisions of this Court cited in Part I herein did not establish the principle that an employer could not be ordered to arbitrate a dispute with a union after their agreement to arbitrate has expired, the question is an important one which should be settled by this Court. Sup. Ct. Rule 19(1)(b).

The ramifications of a ruling that an employer must arbitrate disputes after the labor contract has expired are immense. As a result of the Fourth Circuit's unilateral rewriting of the voluntarily achieved arbitration agreement, a whole new morass of legal entanglements will envelop labor and management, such as:

(1) Does the duty to arbitrate disputes arising between the parties after the expiration of the contract have any limitation in time or does it extend forever?

(2) Does the duty to arbitrate disputes arising between the parties after the expiration of the

contract extend to each and every dispute between them?

(3) Is there any means to terminate the duty to arbitrate disputes arising between the parties after the labor contract has expired by its terms?

(4) An employer presently has the right to implement new terms and conditions of employment after bargaining to an impasse with the union. Assume that the prior contract provided for severance pay but the employer bargains to an impasse on its proposal to provide an increased hourly wage but not severance pay. Assume further that the employer lawfully implements its proposal but, before the parties have reached agreement on a new contract, the employer is compelled to cease operations. Can a union, in the foregoing circumstances, compel an employer to arbitrate the employees' right to severance pay under the expired contract?

(5) If one party is to be held to a duty to arbitrate issues after the expiration of the agreement to arbitrate, will the other party be free to take economic action or will it be subject to some restraint conceived as a *quid pro quo* for the perpetual duty to arbitrate, i.e., an implied, continuing, no-strike obligation?

The possibility for these and many other unsettling developments in labor-management relations arise as a direct result of the Fourth Circuit's decision.

The Fourth Circuit's decision raises important issues because it ignores the fact that arbitration is a favored procedure for resolving disputes only where the parties have voluntarily agreed to arbitration. Absent

an agreement to arbitrate, it has been the policy of federal labor laws to allow the parties to resolve their disputes voluntarily, even by the use of economic weapons. The Fourth Circuit's opinion could lead to great inroads on these long existing and fundamental federal labor policies; for this reason, the Court should grant a writ of certiorari to review the Fourth Circuit's decision.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-2285

Local Number 358, Bakery & Confectionary Workers Union, AFL-CIO,
Appellant,
versus
Nolde Brothers, Incorporated,
Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert R. Merhige, Jr., District Judge.

(Argued April 8, 1975 Decided October 23, 1975)

Before ALDRICH, Senior Circuit Judge,* CRAVEN and WIDENER, Circuit Judges.

*First Circuit, Sitting by Designation.

Ronald Rosenberg, (Henry Kaiser; Van Arkel; Kaiser, Gressman and Rosenberg; Jery D. Anker; Lawrence J. Sherman; Lichtman, Abeles, Anker and Nagle; Jay Levit; Stallard and Levitt on brief) for Appellant; Francis V. Lowden, Jr., (Abram W. Vandermeer, Jr.; Hunton, Williams, Gay and Gibson on brief) for Appellee.

CRAVEN, Circuit Judge:

In 1970 Nolde Brothers, Inc. and Local No. 358 of the Bakery and Confectionery Workers International Union entered into a collective bargaining agreement covering the employees at the company's Norfolk bakery. The agreement provided for severance pay upon the closing of the bakery for each employee actively employed by Nolde for at least three years,[1] and also contained an all-encompassing arbitration clause.[2]

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1. Article IX. Wages.

. . .

Section 5. Each full-time employee who is permanently displaced from his employment with the Company by reason of the introduction of labor saving equipment, the closing of a department, the closing of an entire plant, or by lay off, shall be compensated for such displacement providing he has been actively employed by the Company for a period of at least three (3) years. An eligible employee's compensation for his displacement shall be on the basis of thirty (30) hours of severance pay, at his straight time hourly rate, for each full year or major portion of a year of active employment commencing with the fourth (4th) year following his most recent date of hire. Payment under this formula shall be limited to a maximum of nine hundred (900) hours of severance pay.

2. Article XII. Grievances and Arbitration.

Section 1. All grievances shall be first taken up between the Plant Management and the Shop Steward. If these parties shall be unable to settle the grievance, then the Business Agent of the Union shall be called in, in an attempt to arrive at a settlement of the grievance. If these parties are unable to settle the grievance, the dispute will be settled as called for in Sections 2 and 3 of this Article.

On August 21, 1973, following several months of fruitless negotiations over proposed changes in the contract, the Union gave the seven days written notice required to terminate the agreement. Negotiations continued for a few days after the termination, but on August 31, the company, faced with the Union's threats to strike over certain contract demands, permanently closed the bakery. Nolde subsequently paid wages and vacation pay accrued through the date of the contract termination, and in addition paid wages for the few days between contract termination and the August 31 closing. But the company rejected the Union's demand that it either give severance pay to all its employees or arbitrate its duty to do so.

The Union then instituted this suit under Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, to compel arbitration of the severance pay issue or, in the alternative, for an award of the severance pay. The district court granted the company's motion

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Section 2 In the event that any grievance cannot be satisfactorily adjusted by the procedure outlined above, either of the parties hereto may demand arbitration and shall give written notice to the other party of its desire to arbitrate. No individual employee shall have the right to invoke arbitration without the written consent of the Union. The Arbitration Board shall consist of three (3) persons, one selected by the Company and one selected by the Union. The two persons selected shall agree upon a third person who shall act as Chairman of the Arbitration Board.

Section 3. The decision or award of the Arbitration Board, or a majority thereof, shall be final and binding on both parties. If the third party to arbitration is not selected in ten (10) days from receipt of notice, the Director of the U. S. Conciliation Service shall be requested to make the appointment. The expense of the neutral arbitrator shall be borne equally by the parties.

Section 4. Pending negotiations or during arbitration there shall be no strikes, lock-outs, boycotts, or any stoppages of work.

for summary judgment on both counts, holding (1) that "the union's voluntary termination of its collective bargaining agreement with the company . . . destroyed any right to severance pay created by the collective bargaining agreement for displaced employees;" (2) that there was thus no severance pay issue to arbitrate; and (3) that even if there had been an arbitrable issue there was no duty to arbitrate, for it had died with the contract that created it.

We disagree. In our view, the district court approached the issues backwards when it first determined whether the company's obligation for severance pay survived the contract. This is a question more suitable for arbitration than judicial decision, as we explain below. Thus, the first question for the district court was whether the company's duty to arbitrate this particular issue survived the expiration of the contract. We believe it did, and accordingly we reverse and remand with instructions that the district court order the company to arbitrate.

I.

The Union and the company apparently presented to the district court, as they have to us, contrasting views of the nature of severance pay. The Union argued that severance pay is an "earned" or "vested" right accruing to employees over a period of time, whose benefits cannot be denied them regardless when they come to fruition. The company, on the other hand, characterized severance pay as "a creation of the collective bargaining agreement," with the right to it contingent upon the occurrence of the triggering event—here the bakery closing—during the term of the contract.

The district court erred in choosing one characterization—the company's—over the other, for in fact severance pay has no immutable nature. It is indeed a creature of contract, but this means no more nor less than that it is in a given case exactly what the parties intended to make it when they bargained. In one case the parties may intend it to be available only if a triggering event occurs during the contract term. But as the Supreme Court has noted, there is "no reason why parties could not if they so chose agree to the accrual of rights during the term of an agreement and their realization after the agreement had expired." *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 555 (1964). Thus the nature of the employees' right to severance pay in the circumstances here depends entirely upon the intent of the Union and the company when they wrote the relevant provision.

Any question of the intent behind a collective bargaining term must be referred to arbitration if it is available. This is in accord with the national labor policy expressed by Congress:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or *interpretation* of an existing collective-bargaining agreement.

LMRA § 203(d), 29 USC § 173(d) (emphasis added). This is also the clear teaching of the *Steelworkers Trilogy*,[3] and is based on the sound principle that an arbi-

3. United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

trator, familiar as he is with both the parties and the industry, is better positioned than a court to divine their intent:

> The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment.

United Steelworkers v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960).

The arbitrator's absolute authority in such a matter, and a court's corresponding lack of power, was affirmed in another passage from the *Steelworkers Trilogy:*

> [T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.

United Steelworkers v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960). The district court below pre-empted the arbitrator rather than overruling him. But he may do neither under the labor law.

II.

The company argues most strenuously, however, that it cannot be ordered to arbitrate the severance pay issue because the collective bargaining agreement containing its duty to arbitrate had been terminated before the instant dispute arose. In support of its position the company cites several Supreme Court statements to the effect that a party cannot be required to arbitrate any issue unless it has agreed to do so.[4] We think the statements do not support the company's contention that a duty to arbitrate cannot survive the termination or expiration of a contract.

First, the Supreme Court has itself undercut the apparent premise that arbitration must rest upon contract by holding that in some circumstances a new employer who takes over a unionized business can be compelled to arbitrate under the arbitration clause of its predecessor's agreement, even though the new employer—a stranger to the bargaining—never agreed to such arbitration. *John Wiley & Sons, supra.* Although the potential implications of the *Wiley* case have since been narrowed, *see Howard Johnson Co.*

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4. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.

United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582 (1960).

> Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties.

Atkinson v. Sinclair Ref. Co., 370 U.S. 238, 241 (1962).

> The law compels a party to submit his grievances to arbitration only if he has contracted to do so.

Gateway Coal Co. v. UMW, 414 U.S. 368, 374 (1974).

v. *Hotel Employees*, 417 U.S. 249 (1974); *NLRB* v. *Burns Security Services, Inc.*, 406 U.S. 272 (1972), the Court has not retreated from its recognition that in some instances the national labor policy can impose an arbitration duty upon an unconsenting party:

> While the principles of law governing ordinary contracts would not bind to a contract an unconsenting successor to a contracting party, a collective bargaining agreement is not an ordinary contract. ". . . [I]t is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . . The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant." . . . Central to the peculiar status and function of a collective bargaining agreement is the fact, dictated both by circumstance, . . . and by the requirements of the National Labor Relations Act, that it is not in any real sense the simple product of a consensual relationship.

John Wiley & Sons, supra, at 550 (citations omitted).

It is true that in *Wiley* there was a contract with an arbitration clause in existence when the union filed suit to compel arbitration,[5] whereas here there was none either when the dispute arose or when suit was filed. But we believe the Supreme Court has indicated that the principle of *Wiley* requires arbitration in the

5. The original employer and the union had entered into a contract with an arbitration clause that was to expire on January 31, 1962. The original employer merged with the new employer on October 2, 1961. The union filed suit against the new employer to compel arbitration one week before the expiration of its contract with the original employer. *See* 376 U.S. at 544-46.

latter circumstance as well. In *Piano & Musical Instrument Workers* v. *W. W. Kimball Co.*, 221 F. Supp. 461 (N.D. Ill. 1963), the district court held that a union-employer dispute over rehiring of discharged employees, centering on the employees' seniority rights, was arbitrable even though the dispute arose several days after termination of the parties' collective bargaining agreement. The Seventh Circuit reversed, holding that arbitration could not be required in such circumstances. 333 F.2d 761, 765 (1964). The Supreme Court granted certiorari and summarily reversed the Seventh Circuit. 379 U.S. 357 (1964). Significantly, the Supreme Court cited only the first *Steelworkers Trilogy* case[6] and *Wiley*.

We believe *Wiley* and its use by the Supreme Court in *Piano Workers* support our view that a dispute that turns on whether parties intended certain accruable rights to be enjoyable, even after contract expiration, must be arbitrated if the contract provided for arbitration of such disputes, even if the contingency giving rise to the dispute itself transpired after expiration of the contract. *Accord, Steelworkers* v. *H. K. Porter Co.*, 64 L.R.R.M 2201 (W.D. Pa. 1966); *cf. IAM* v. *Howe Sound Co.*, 350 F.2d 508 (3d Cir. 1965). *But see U.A.A. & A.I.W.* v. *Robertshaw Controls Co.*, 405 F.2d 29 (2d Cir. 1968) (en banc); *Ward Foods, Inc.* v. *Bakery & Confectionery Workers*, 360 F. Supp. 1310 (S.D.N.Y. 1973); *cf. Milk Drivers* v. *Thompson's Dairy, Inc.*, 80 L.R.R.M. 3403 (D.D.C. 1972), *aff'd mem.*, 489 F.2d 1272 (D.C. Cir. 1974).

6. United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

The company does not deny that the contract by its terms contemplated arbitration of any dispute over severance pay. Thus it is clear that the company literally agreed to arbitrate any issue of its obligation for severance pay. *See* note 4, *supra,* and accompanying text.

Judge Widener, concurring and dissenting, advances an argument that the employer rejects. The battle was not joined here or in the district court over whether the court or the arbitrator should decide that the question was arbitrable. What the fight is about, as stated in appellee's brief, is whether the duty to arbitrate can survive contract termination. We think the issue to which our brother Widener has addressed himself is not before us, but because of our respect for his viewpoint, we would add that we read the cases upon which he relies as being consistent with the general rule that the initial question of arbitrability is a matter to be determined by the court. An exception to the rule is where a clause in a labor contract purporting to exclude some matters from arbitration is vague and ambiguous. In such a case an arbitrator may be expressly empowered to not only adjudge grievances but also to decide whether the instrument gives him the power to do so. That is all that we held in *A. S. Abell Co.* v. *Baltimore Typographical Union No. 12,* 338 F.2d 190 (4th Cir. 1964). Indeed, Judge Sobeloff said in that case that if the meaning of the exclusionary section "were entirely clear it would become the duty of the court to declare the meaning." Again, in *Winston-Salem Printing Pressmen & Assistants Union No. 318* v. *Piedmont Publishing Co.*, 393 F.2d 221 (4th Cir. 1968), Judge Sobeloff writing for the court, acknowledged that

"submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty." Only then did he conclude that the contract in that case specifically provided that the construction to be placed upon any clause, including the clause authorizing arbitration, was to be resolved through the grievance procedure and by the arbitrator himself. Judge Winter, sitting as a district judge, has written to the same effect. *Local 24, IBEW* v. *Wm. C. Bloom & Co.*, 242 F. Supp. 421, 428-29 (D.Md. 1965). Indeed, the rule and its exception are now so well settled that both have found expression in one of the encyclopedias:

> Since the duty to arbitrate is of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty. The questions whether a party to a collective bargaining agreement must arbitrate, and what issues he must arbitrate, must be determined by the court on the basis of the contract entered into by the parties.
>
> However, the arbitrability of a dispute may itself be subject to arbitration if the parties have clearly so provided in the agreement. Of course, the court must decide the threshold question whether the parties have in fact conferred this power on the arbitrator. If they have, the court should stay proceedings pending the arbitrator's determination of his own jurisdiction, unless it is clear that the claim of arbitrability is wholly groundless.

48 Am. Jur. 2d "Labor and Labor Relations" § 1257 at 783-84.

We simply hold that the company must abide by that agreement even after the contract embodying it has terminated. Not only the decisions in *Wiley* and *Piano Workers*, but also policy considerations indicate such a result. The company's obligation for severance pay depends upon the parties' intent behind the contract provision for severence pay. A court, after the *Steelworkers Trilogy*, is not the proper form [sic] in which to inquire into that intent. If the expiration of the contract were held to strip the arbitrator of power, the best means of determining the true content of the parties' original agreement would not be available—which would increase the possibility of the parties' resorting to economic warfare in support of their respective interpretations. But this is precisely the kind of industrial unrest that collective bargaining, coupled with arbitration of difference over contract terms, is intended to avert. *See* LMRA § 101, 29 U.S.C. § 151. Our holding that arbitration is still available serves the most basic policy of our labor laws.

Our decision should not be read as disapproving those cases that hold arbitration unavailable for resolution of individual employee grievances, or disputes involving nonaccruable rights, that arise after expiration of a collective bargaining agreement. *See, e.g., OCAW* v. *American Maize-Prods. Co.*, 492 F.2d 409 (7th Cir.), *cert. denied*, 417 U.S. 969 (1974); *Procter & Gamble Indep. Union* v. *Procter & Gamble Mfg. Co.*, 312 F.2d 181 (2d Cir. 1962), *cert. denied*, 374 U.S. 830 (1963); *Garlick Funeral Homes* v. *Service Employees*, 85 L.R.R.M. 2749 (E.D.N.Y. 1974). We consider those cases different. To hold that a company had to arbitrate an employee discharge or a lockout that occurred after expiration of a contract providing for arbitration would mean that an employer who once agreed to submit its managerial actions to potential arbitration would in effect have agreed to do so for all time. That we do not hold. Our decision affects only those rights, like severance pay, that employees earn and that may or may not "vest" for future enjoyment—contingent upon a particular event.[7] The best way to determine whether the union and the employer meant for employees to enjoy those rights regardless of when the contingency occurs is to arbitrate. That is all we require.

Reversed and Remanded
With Instructions.

ALDRICH, Senior Circuit Judge, concurring:

With great respect, I am not entirely sure of the full extent that my brethren are in disagreement, and perhaps I am being over-simplistic. However, it seems to me that what the parties are disputing—whether the claim for compensation vested while the contract

7. We believe one of the cases heavily relied upon by appellee is distinguishable from this case on the ground discussed in the text. In Milk Drivers v. Thompson's Dairy, 80 L.R.R.M. 3403 (D.D.C. 1972), *aff'd mem.*, 489 F.2d 1272 (D.C. Cir. 1974), the court refused to order arbitration over severance pay when a company went out of business after the expiration of the collective bargaining agreement. But the contract there did not on its face grant employees an absolute right to severance pay, as does the contract in the instant case. Instead, the contractual duty of the employer was to "negotiate the terms of discontinuance regarding severance pay." Under that contract there was no room for an argument that the parties *at the time of original bargaining* had intended employees to receive severance pay upon a post-termination shutdown. The contract contemplated only that the parties would discuss the *possibility* of severance pay *at the time of shutdown*. Nothing could accrue, and the obligation to negotiate simply died with the contract. An agreement to negotiate does not last forever.

was in force, and therefore survived its termination—is plainly a grievance within the meaning of the arbitrability clause, and neither we, nor the arbitrator, face the issue of arbitrability. The only issue, in other words, is whether the grievance is sound, which, of course, is for the arbitrator.

I see three possibilities open to court decision in this area: that there is an arbitrable issue of substance; that there is an arbitrable issue of whether the issue of substance is one subject to arbitration; or there is no arbitrable issue at all. If Judge Widener denies this first possibility, then I must disagree with him. At the same time, I think I see what troubles him. If the arbitrator, when appointed, rendered a decision to the effect that he saw no arbitrable issue, I don't know what a court could do about it. We do not face that question and I doubt if a court ever would. However, I do not see how, in theory, a court that can, in the proper circumstances, rule that there is no question to be arbitrated, cannot equally rule that there is one. Indeed, that is what it does every time it instructs the arbitrator that there is an arbitrable issue whether the arbitration clause covers the substantive matter sought to be arbitrated.

WIDENER, Circuit Judge, concurring and dissenting:

While I agree that this case calls for referral to arbitration, I do not agree that *Piano & Musical Instrument Workers* v. *W. W. Kimball*, 379 US 357 (1964), forecloses an objection to arbitration being lodged before the arbitrator. I, therefore, respectfully dissent from that portion of the majority's opinion.

In *Piano Workers*, the defendant Kimball had entered into a collective bargaining agreement with Piano

& Musical Workers Local 2549. The contract period ran from October 1, 1960 to October 1, 1961. In August 1961, the defendant decided to discontinue operations at its Melrose Park Plant in Illinois and began the process of discharging all employees at that location. On October 9 of that year, eight days after the expiration of the collective bargaining agreement, Kimball opened a new plant at French Lick, Indiana.

Despite the fact the union contract had been terminated, the union claimed its members had a right to priority in employment at the new plant. It based its claim on Article II, Section 2, Paragraph 6 of the contract, which stated:

> "When reemployment occurs employees will be called back to work in order of their seniority."

When the company refused to follow the rehiring procedure desired by the union or submit the dispute to arbitration, the union brought suit in the United States District Court for the Northern District of Illinois.

The district court in that action determined that the question of whether the issues raised by the complaint were arbitrable following termination of the contract was a subject for arbitration. As the court pointed out, it was "the arbitrator's construction of that [arbitration] clause and not the Court's that was bargained for." 221 F.Supp. 463. The court did not, therefore, in that holding, go so far as to hold that the union-employer dispute over rehiring was, in fact, arbitrable.

On appeal, the Seventh Circuit held that the lower court's determination that the question of arbitrability was for the arbitrator was in error. But it went on to conclude that arbitration could not be ordered under

the circumstances since the record failed to show that Kimball, during the term of the agreement, had in any way violated the contract rights of any of its employees. 333 F2d 761.

The Supreme Court subsequently granted certiorari and summarily reversed the Seventh Circuit. The question presented to the Supreme Court, however, did not include the issue of whether the court or the arbitrator was to determine the threshold question of arbitrability under these circumstances. Rather, the issue before the Court in that case was the propriety of the Circuit Court's dismissal of the appellant's claim based upon the merits of the dispute.[1]

I am of the opinion, therefore, that *Piano Workers* does not require that the substantive dispute in the present case be deemed arbitrable. Nor do I believe that the conclusion is mandated by the Supreme Court's opinions in *United Steelworkers* v. *American Mfg. Co.* or *John Wiley & Sons* v. *Livingston.*[2] The question before us is a very narrow one: Is the arbitration clause susceptible of an interpretation that necessarily covers the asserted dispute? While doubts should be resolved in favor of coverage, *United Steelworkers* v. *Warrior & Gulf Co.*, 363 US 574, 582-83 (1960); *A. S. Abell Co.* v. *Baltimore Typographical Union No. 12*, 338 F2d 190, 193 (4th Cir. 1964), the court should ever be mindful of Mr. Justice Douglas'

1. The second opinion of the district court which establishes what the Supreme Court decided in its own case was not considered by the majority here. It is reported in 239 F.Supp. 523 (1965).

2. The *Steelworkers Trilogy* and *John Wiley and Sons* were specifically discussed and construed in our opinion in *Winston-Salem Printing Pressmen & Assistants Union No. 318* v. *Piedmont Publishing Co.*, 393 F2d 227 (4th Cir. 1968), which case is later discussed.

admonishment in *United Steelworkers* v. *American Mfg. Co.*, 363 US 564 (1960):

> "The courts . . . have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claims." 363 US 564, 568.

Thus, where the determination of the arbitrability of a dispute would necessarily require consideration of the merits of the underlying disagreement, both issues should be submitted to the arbitrator. *A. S. Abell Co.* v. *Baltimore Typographical Union No. 12*, 338 F2d 190 (4th Cir. 1964).

Our decision in *Winston-Salem Printing Pressmen & Assistants Union No. 318* v. *Piedmont Publishing Co.*, 393 F2d 221 (4th Cir. 1968),[3] is precisely in point here on facts which are indistinguishable for all practical purposes. The majority, however, fails to follow that case. There, we scrupulously avoided any expression as to how the question of arbitrability should be

3. An examination of the contract in that case shows that the phrase construed was "any dispute" over wages, hours, working conditions, and shop practices. 393 F2d 221, n. 1. I submit the difference between "any dispute" in *Winston-Salem Printing Pressmen*, and "any grievance" in question here, is more theoretical than real. It is true that in the *Winston-Salem Printing Pressmen* case the contract provided for arbitration of "the construction to be placed upon any clause of . . . [the] agreement," but that is what a grievance is, a dispute between employee and employer over the meaning of the collective bargaining agreement. A case directly in point and consistent with my viewpoint is *U.A.W., et al.* v. *Cardwell Mfg. Co.*, 304 F2d 801 (10th Cir. 1962), where the matter to be submitted to arbitration was a "grievance" which was defined in the contract as "any dispute between the Company and the Union." Here, the fact that "any grievance" is undefined by contract is all the more reason to submit to arbitration the applicability of the phrase to the dispute at hand.

resolved where the application of the arbitration clause itself was subject to dispute. In that case, an employer sought to avoid arbitration on the grounds that the duty to arbitrate ceased with the expiration of the contract when the request to arbitrate came subsequent thereto. The district court concluded that the contract in question did not state that notice to arbitrate had to be given prior to expiration of the agreement, but that should settlement of contract disputes prove impossible, the differences would be arbitrated. On appeal, we held that where the issue of arbitrability involved interpretation of the contract, the entire matter, including the question of arbitrability should be submitted to the arbitrator.

It is generally held that the term "grievance" is not a term of art, and has no connotation different from its meaning in ordinary use. *Forrest Industries, Inc.* v. *Local No. 3—436 Int. Woodworkers*, 266 F.Supp. 265 (D. Ore. 1966), aff'd. 381 F2d 144 (9th Cir. 1967); *Butte Miner's Union No. 1, etc.* v. *Anaconda Co.*, 159 F.Supp. 431, 435 (D. Mont. 1958); *Petition of Labor Mediation Board*, 365 Mich. 645, 114 N.W.2d 183, 187 (1962); *Timken Roller Bearing Co.* v. *NLRB*, 161 F2d 949, 955 (6th Cir. 1947). And the teaching of the Supreme Court in its decision in *Warrior & Gulf* is to the effect that a liberal and broad construction should be given the term in the interest of encouraging the use of machinery which the parties themselves have set up for the peaceful settlement of disputes. *Forrest Industries, Inc.* v. *Local No. 3-436, Int. Woodworkers*, 381 F2d 144, 146 (9th Cir. 1967).

Warrior & Gulf states the rule we should follow now, as we have in the past:

"Since any attempt by a court to infer such a purpose necessarily comprehends the merits, the court should view with suspicion an attempt to persuade it to become entangled in the construction of the substantive provisions of a labor agreement, even though the back door of interpreting the arbitration clause, when the alternative is to utilize the services of an arbitrator."

* * *

"The judiciary sits in these cases to bring into operation an arbitral process which substitutes a regime of peaceful settlement for the older regime of industrial conflict. Whether contracting out in the present case violated the agreement is the question. It is a question for the arbiter, not for the courts." 363 US at 585.

This conclusion is consistent with our earlier holding in *A. S. Abell Co.* v. *Baltimore Typographical Union No. 12*, 338 F2d 190 (4th Cir. 1964), where we stated that where it is not "clear beyond rational debate" that the litigants intended the dispute to be submitted to arbitration, the entire matter, including the question of arbitrability, should be referred to the arbitrator. To conclude otherwise would be to foreclose any opportunity to establish, by way of bargaining history, the intent of the parties to exclude certain matters from arbitration, for it is firmly established in this circuit that bargaining history is of no legitimate use in determining whether to order the submission of a grievance to arbitration. Id. at 194. See also *Local No. 1434 IBEW* v. *E. I. duPont deNemours & Co.*, 350 F.Supp. 462, 466-67 (E.D. Va. 1972).

In the instant case, it is by no means "clear beyond rational debate" that the dispute over severance pay after contract termination constitutes a "grievance" within the meaning of the contract. The contract itself merely provides:

> "In the event any grievance cannot be satisfactorily adjusted . . . either of the parties hereto may demand arbitration. . . ."

Nowhere within the agreement have the parties attempted to define "any grievance." Since the phrase "any grievance" is left undefined, whether the parties intended that disputes arising after the termination of the contract be subject to arbitration may well call for a detailed examination of the bargaining history leading up to the contract, a task uniquely suited to the arbitrator. I am of opinion either party should be allowed to offer bargaining history to explain the unde-

fined phrase, which, being undefined, and subject to bargaining history, is not "clear beyond rational debate."

The majority, without the benefit of any evidence as to the parties' intent, has chosen to foreclose further inquiry into the question of arbitrability. In essence, it holds that the courts must conclusively decide the question of arbitrability, even where it is not "clear beyond rational debate" what the intent of the parties might have been. In so doing, the majority opinion extends an open invitation, indeed a command, to the courts to entangle themselves in the construction of both procedural and substantive provisions of labor agreements. This I consider to be improvident, clearly contrary to the law which has prevailed in this circuit, and not in keeping with the rule as stated in *Warrior and Gulf* at p. 585.

Moreover, whether the parties in the instant case intended for the dispute over severance pay to be subject to arbitration after the termination of the contract seems to me to be inextricably intertwined with the substantive problem of whether or not it was the intent of the parties that severance pay provided for in the contract survive its termination. Certainly, no dispute can arise under the terms of the expired contract unless some substantive right survives its expiration.

Even assuming that there be doubt that the dispute is arbitrable, given the standard to be applied, it is clear that this matter must be submitted to arbitration at least for threshold consideration. To go further, however, and hold that the controversy is so clearly arbitrable under the contract as to foreclose the introduction of any evidence before the arbitrator as

to the intent of the parties is, in my opinion, to substitute the views of this court for that of the arbitrator as to the merits of the dispute. This would create a "curious rule which required that intertwined issues . . . growing out of a single dispute and raising the same question on the same facts had to be carved up between two different forums, one deciding after the other. Neither logic nor considerations of policy compel such a result."[4]

I would accordingly remand with instructions that:

(1) The whole dispute should be referred to arbitration.

(2) At the arbitration, the company may make the objection that the dispute over severance pay under the facts presented was not intended by the parties to be subject to arbitration.

(3) If the arbitrator should decide the dispute is subject to arbitration, then he should go on and decide, under the facts presented, the substantive question of whether or not "the parties intended. . . [severance pay] rights to be enjoyable even after contract expiration." Slip opinion, p. 11.

Since the Supreme Court in *Piano Workers* did not decide the question of whether the question of arbitrability of the dispute was subject to arbitration, the majority here has obviously chosen to follow the Seventh Circuit in *Piano Workers* rather than our own

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4. *John Wiley & Sons* v. *Livingston*, 376 US 543, 547 (1964). While the Court was dealing with a question of procedural arbitrability, the logic employed there appears equally applicable to the facts of this case for the majority here has taken "intertwined issues . . . growing out of a single dispute" and carved them up between two different forums.

cases. Not only do I prefer the logic of *Cardwell Mfg. Co.* and our cases of *A. S. Abell Co.* and *Winston-Salem Printing Pressmen*, for they give a more liberal reading to arbitration provisions, which I think consistent with national labor policy, I submit we are bound by our own decisions absent an en banc court.

"Whether contracting out [arbitration] in the present case violated the agreement is the question. It is a question for the arbiter, not the courts." 363 US at 585. This final conclusion of the Supreme Court in *Warrior and Gulf* is equally applicable here and no more than a following of the statute, 29 USC § 173(d), as it declares that settlement of labor disputes by arbitration is the "desirable method" for settling "grievance disputes" arising not only from the "interpretation" of collective bargaining agreements, but also their "application." Typical of the majority opinion is its placing of italics on *interpretation* in its quotation of the statute, slip opinion p. 6, while not acknowledging anywhere in the opinion the equal emphasis Congress placed on *application*. That is its fundamental error.

Thus, the majority has fallen into the same trap for which it chides the district court at p. 7 of the slip opinion. It "pre-empted the arbitrator rather than overruling him." It "may do neither under labor law." This court has no more authority to pre-empt the arbitrator than has the district court.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 74-2285

Local Number 358, Bakery & Confectionary Workers Union, AFL-CIO,
Appellant,
vs.
Nolde Brothers, Incorporated,
Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond.

(Filed November 26, 1975)

The appellee's petition for rehearing and suggestion for rehearing en banc has been submitted to the court. A poll of the court was requested, and in the poll a majority of the judges eligible to vote therein have voted to deny rehearing and rehearing en banc.

It is, therefore, ORDERED that rehearing and rehearing en banc be and they are hereby denied.

For the Court—by direction.

/s/ William K. Slate, II
Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

CIVIL ACTION NO. 73-663-R

LOCAL NO. 358, BAKERY AND CONFECTIONERY
WORKERS INTERNATIONAL UNION

v.

NOLDE BROS., INC.

MEMORANDUM

(Filed September 19, 1974)

This matter arises out of plaintiff Local No. 358, Bakery and Confectionery Workers International Union's ("the union") voluntary termination of its collective bargaining agreement with defendant Nolde Brothers, Inc. ("the company"), and the company's subsequent permanent closure of its Norfolk bakery on August 31, 1973, three days subsequent to the termination of the collective bargaining agreement. Despite the fact that there was no collective bargaining agreement in existence on August 31, 1973, when the company ceased operations, the union asserts that its newly unemployed members were entitled to collect severance pay, which had been provided for in Article IX, § 5 of the collective bargaining agreement or, alternatively, that the company was under a contractual obligation to arbitrate the severance pay issue. The company resists

both these contentions and further attacks the union's assertion that this Court has jurisdiction under § 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, and under the United States Arbitration Act, 9 U.S.C. § 4.

Each party has filed a motion for summary judgment, and the matter is now ripe for disposition.

The facts are undisputed: The union and the company entered into a collective bargaining agreement on July 28, 1970, having an expiration date of July 21, 1973, and containing the severance pay and arbitration clauses here at issue.[1] By the terms of Article XIX the agreement was to remain in full force and effect after July 21, 1973, until a new agreement had been reached and executed, or until either the union or the company terminated the agreement by giving seven days written notice.

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1. . . . Article IX—*Wages*

Section 5. Each full-time employee who is permanently displaced from his employment with the Company by reason of the introduction of labor saving equipment, the closing of a department, the closing of an entire plant, or by lay off, shall be compensated for such displacement providing he has been actively employed by the Company for a period of at least three (3) years. An eligible employee's compensation for his displacement shall be on the basis of thirty (30) hours of severance pay. at his straight time hourly rate, for each full year or major portion of a year of active employment commencing with the fourth (4th) year following his most recent date of hire. Payment under this formula shall be limited to a maximum of nine hundred (900) hours of severance pay.

. . . Article XII—*Grievances and Arbitration*

Section 1. All grievances shall be first taken up between the Plant Management and the Shop Steward. If these parties shall be unable to settle the grievance, then the Business Agent of the Union shall be called in, in an attempt to arrive at a settlement of the grievance. If these parties are unable to settle the grievance, the dispute will be settled as called for in Sections 2 and 3 of this Article.

On May 16, 1973, the union advised the company, pursuant to § 8(d) of the National Labor Relations Act, that it wished to negotiate certain changes in the existing contract. There followed three months of fruitless negotiations which culminated in the union's giving the company the seven days written notice as required by Article XIX to terminate the contract on August 21, 1973. At a bargaining session held August 31, 1973, the union rejected the company's last offer and stated that it would strike unless the company agreed to its most recent offer. The company thereupon gave notice that it would permanently close its Norfolk bakery and subsequently paid wages and accrued benefits, including vacation pay for vacations earned and due employees, as of August 27, 1973, and additionally paid wages due for any work performed by its employees between August 27, 1973 and the permanent closing date.

Section 2. In the event that any grievance cannot be satisfactorily adjusted by the procedure outlined above, either of the parties hereto may demand arbitration and shall give written notice to the other party of its desire to arbitrate. No individual employee shall have the right to invoke arbitration without the written consent of the Union. The Arbitration Board shall consist of three (3) persons, one selected by the Company and one selected by the Union. The two persons selected shall agree upon a third person who shall act as Chairman of the Arbitration Board.

Section 3. The decision or award of the Arbitration Board, or a majority thereof, shall be final and binding on both parties. If the third party to arbitration is not selected in ten (10) days from receipt of notice, the Director of the U.S. Conciliation Service shall be requested to make the appointment. The expense of the neutral arbitrator shall be borne equally by the parties.

Section 4. Pending negotiations or during arbitration there shall be no strikes, lock-outs, boycotts, or any stoppages of work.

Subsequent to August 31, 1973, the union made a demand for severance pay, labeling such either "deferred wages" or a "vested right" established by the terminated contract, and further demanded that the company arbitrate the issue. The company refused to entertain the union's claim for severance pay or, in the alternative, to arbitrate the dispute, asserting that both severance pay and arbitration were rights created solely by the collective bargaining agreement. The company took the position that the union's voluntary termination of the contract on August 27, 1973, deprived its employees of any right to severance pay due under it as a result of the company's plant closure and any right to have the severance pay dispute submitted to arbitration.

The parties present to the Court for resolution two related issues: Whether employees who voluntarily through their union terminate a collective bargaining contract, containing severance pay and arbitration provisions, at the expiration of the contract period are entitled to (1) severance pay, and (2) the right to have the severance pay dispute submitted to arbitration when the employer subsequently closes the plant and terminates the employment of its employees. Because of the Court's disposition of the severance pay issue, it will be unnecessary to resolve the question whether arbitration rights survive the expiration of the collective bargaining agreement which created them.

A. JURISDICTION

The union asserts that the right of the company's employees to severance pay was created and vested in them by the collective bargaining contract. The claim of a contract between an employer and a labor organiza-

tion confers jurisdiction under § 301(a) of the Labor-Management Relations Act, although the plaintiff must prove the existence of the contract to obtain relief. *Genesco, Inc.* v. *Joint Council 13, United Shoe Workers of America*, 341 F.2d 482, 484 (2d Cir. 1965).[2]

B. CHOICE OF LAW

Federal law provides the beacon to guide the lower federal courts in fashioning the law of the collective bargaining agreement. *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 456 (1953). The Court undertakes its responsibility to fashion the common law of the collective bargaining agreement, however, with full awareness that *Lincoln Mills* does not "envision any free-wheeling inquiry into what the federal courts might find to be the most desirable rule, irrespective of congressional pronouncements." *Howard Johnson* v. *Detroit Local Joint Executive Board*, 42 U.S.L.W. 4834, 4836 (U.S., June 6, 1974).

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2. Since the Court holds herein that the union can show no arguable contractual entitlement to severance pay and that therefore there is no arbitrable severance pay dispute between the union and the company, it will be unnecessary to decide whether the union can obtain jurisdiction to compel arbitration under 9 U.S.C. § 4. The Court notes, however, that a written agreement to arbitrate is a prerequisite to the Court's taking jurisdiction under 9 U.S.C. § 4, and the Court has determined that there was no written contract in effect between the union and the company, when the company gave notice on August 31, 1973, of its intention to permanently close its Norfolk bakery. See *Proctor & Gamble Independant Union* v. *Proctor & Gamble*, 312 F.2d 181, 186 (2d Cir. 1962); *Local Union No. 998* v. *B. & T. Metals Co.*, 315 F.2d 432, 435-36 (6th Cir. 1963); *Ward Foods, Inc.* v. *Local No. 50, Bakery and Confectionery Workers Union*, 360 F. Supp. 1310, 1312 (S.D. N.Y. 1973).

C. ENTITLEMENT TO SEVERANCE PAY

"Severance Pay" as defined by Article IX, § 5 of the collective bargaining agreement is the right of full time employees who have been actively employed by the company for at least three years to obtain compensation from the company upon displacement from employment by the "introduction of labor saving equipment, the closing of a department, the closing of an entire plant, or by layoff." The plaintiff union proceeds from the premise that severance pay is an "earned" or "vested" right. As evidence in support of this contention, it points out that the severance pay clause appears in Article IX, entitled "Wages," of the collective bargaining agreement and urges that severance pay is earned by the employees of the company and accrue to them in the same manner that the hourly wage is earned and likewise accrues. See, *United Steelworkers of America* v. *H. K. Porter Co.*, 64 LRRM 2201 (W.D. Pa. 1966), where the court said that ". . . [t]he rights of the employees to such benefits as severance and vacation pay and pensions do not automatically terminate upon the expiration of the agreement establishing them. *John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (1964). They are vested rights and their benefits may well come to fruition at a time beyond the term of the agreement establishing them." 64 LRRM at 2202-03.[3]

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3. The Court does not believe that *United Steelworkers of America* v. *H. K. Porter Co.*, 64 LRRM 2201 (W.D. Pa. 1966), governs the precise facts here at issue. There, the collective bargaining agreement terminated on its expiration date—not by the union's voluntary act of giving written notice, as in the instant case—during the course of contract negotiations, and the court apparently thought that the union's pension, vacation and severance pay rights were arguably vested by the collective bargaining agreement such that an arbitrable issue was preserved by the particular facts of that case. The *Steelworker's* court entered an arbitration order without expressing any opinion on the merits of the union's claim to severance pay, vacation pay, and pension rights.

The Court, however, must reject the union's major premise that the severance pay in issue constitutes an "earned" or "vested" right. The union's voluntary termination of its collective bargaining agreement with the company on August 27, 1973, in the Court's view, destroyed any right to severance pay created by the collective bargaining agreement for displaced employees.

The Court is not precluded by the fact that the severance pay clause is to be found in the article of the collective bargaining agreement entitled "Wages" from finding, as it does, that severance pay is not an earned or vested right. Mere labels are not always dispositive of legal relations between litigants, and courts often find it necessary to cut through the form in order to discover the substantive relations which lay beneath.

The Court rejects the contention that severance pay constitutes earned but deferred income. In the instant case, only certain employees were eligible for severance pay, they being those who had more than three years continuous employment with the bakery, and those eligible could obtain severance pay in only certain specified instances—when an employee is "permanently displaced from his employment with the company by reason of the introduction of labor saving equipment, the closing of an entire plant, or by layoff." Thus severance pay may be likened to an employee insurance policy to help ameliorate the disruptions caused by technological innovation or economic recession and smooth the displaced employees transition to new employment. The right to collect severance pay, like the right to collect on an insurance policy, is contingent upon the happening of the event in question—here a job layoff, a plant closure, or the

introduction of labor saving machinery—during the contract period. With severance pay, as with insurance, where the employee (or the insured) terminates the contract, the right to collect disappears.

Furthermore, severance pay is wholly a creation of the collective bargaining agreement and has no independent existence apart from that agreement. See *Milk Drivers* v. *Thompson's Dairy*, 80 LRRM 3403, 3404 (D. D.C. 1972), *aff'd. per curiam*, 489 F.2d 1272 (D.C. Cir. 1974); *cf. Patterson Parchment Paper Co.* v. *International Paperworkers*, 191 F.2d 252 (3d Cir. 1951). Severance pay provisions in a collective bargaining contract can be altered, modified, or terminated at the will of the parties. By terminating the contract in order to free itself of the no-strike clause as a prelude to calling a strike, as was its right so to do, the union gave up those benefits which were contingent upon the existence of a contract in the hope of securing more lucrative benefits by the application of economic pressure. The union cannot, however, jettison its contract when preparing to strike and then seek its protection once the company brings its own economic weapons into the fray. The union, to adopt a familiar phrase, cannot have its cake and eat it too under the umbrella protection of our national labor laws. Once having abandoned the protection of the contract to resort to legitimate economic struggle in order to improve the wages and working conditions of its membership, it will not be heard to complain when the company, finding itself unfettered by contract, retaliates with legitimate economic countermeasures. *Cf. Ameri-*

can Shipbuilding Co. v. *N.L.R.B.*, 380 U.S. 300, 310-12 (1965).[4]

The Court is satisfied that to hold severance pay a "vested" or "earned" right and breathe into it an existence apart from the collective bargaining contract would be to upset the congressionally created balance between union and employer. This it is loathe to do absent a more explicit directive from the national legislature.

Having concluded that the union voluntarily terminated the contract upon which their right to severance pay was founded, thus destroying any entitlement to severance pay upon the company's subsequent plant closure, the Court finds it unnecessary to decide the question whether the plaintiff's right to arbitrate the severance pay issue survived the expiration of the contract—there being no severance pay issue to arbitrate. The Court notes, however, that the same considerations which compelled its decision that the plaintiff had no right to severance pay would also compel a holding that the plaintiff has no right to submit the severance pay controversy to arbitration. The duty to arbitrate is created by contract and "[n]o obligation to arbitrate a labor dispute arises solely by operation of law." *Gateway Coal Co.* v. *U.M.W.*, 414 U.S. 368, 374 (1974). Since the severance pay issue in this case arose after the expiration of the contract upon which the right to arbitrate was founded, the company had no obligation to submit the dispute to arbitration.

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4. On the other hand, if the union is claiming that the company closed its Norfolk bakery in order to chill unionism in its other plants, rather than out of legitimate economic motives, the proper forum is the Labor Board, not this Court. See *Textile Workers Union* v. *Darlington Mfg. Co.*, 380 U.S. 263 (1965).

Accordingly, the company's motion for summary judgment will be granted, the union's cross motion for summary judgment will be denied, and the complaint will be dismissed for failure to state a claim upon which relief can be granted.

An appropriate order shall enter.

/s/ Robert R. Merhige, Jr.
United States District Judge

Date: 9-19-74

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-2285

Local Number 358, Bakery & Confectionary
Workers Union, AFL-CIO,
Appellant,
versus
Nolde Brothers, Incorporated,
Appellee.

Appeal From the United States District Court
For the Eastern District of Virginia,
At Richmond.

(Filed December 3, 1975)

Upon consideration of a motion of the appellant, for stay of mandate pending application to the United States Supreme Court for a writ of certiorai,

IT IS ORDERED that the motion is DENIED.

For the Court—by direction.

/s/ William K. Slate, II
Clerk

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

CIVIL ACTION NO. 73-0663-R

LOCAL NUMBER 358, BAKERY & CONFECTIONARY WORKERS UNION AFL-CIO,
Plaintiff,
v.
NOLDE BROTHERS, INCORPORATED,
Defendant.

ORDER

In accordance with the directions from the Fourth Circuit in *Local Number 358, Bakery & Confectionary Workers Union, AFL-CIO* v. *Nolde Brothers, Incorporated*, No. 74-2285 (October 23, 1975), and deeming it proper so to do, it is ORDERED and ADJUDGED that Nolde Brothers, Incorporated, submit to arbitration under Article XII of its collective bargaining agreement with the Confectionary Workers Union as requested by the Union on the issues of vacation and severance pay due the Union members at the company's Norfolk bakery, and proceed with said arbitration until a final award be made.

Let the Clerk send a copy of this Order to all counsel of record.

/s/ Robert R. Merhige, Jr.
United States District Judge

Dated: DEC 09 1975

Supreme Court U.S.
FILED
JUL 13 1976
MICHAEL RODAK, JR., CLERK

APPENDIX

In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1198

NOLDE BROTHERS, INCORPORATED,
Petitioner,

vs.

LOCAL NO. 358, BAKERY & CONFECTIONERY WORKERS UNION, AFL-CIO,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 21, 1976
CERTIORARI GRANTED MAY 19, 1976

E. L. Mendenhall, Inc., 926 Cherry St., Kansas City, Mo. 64106, 816-421-3030

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The following opinions, judgments and orders have been omitted in printing this appendix because they appear on the following pages in the printed Petition for Certiorari:

Memorandum Opinion dated September 19, 1974 of the United States District Court, Eastern District of Virginia A24-A33

Opinion dated October 23, 1975 of the United States Court of Appeals, Fourth Circuit A1-A22

Order denying petition for rehearing and suggestion for rehearing en banc dated November 26, 1975, United States Court of Appeals, Fourth Circuit A23

Order denying motion for stay of mandate dated December 3, 1975, United States Court of Appeals, Fourth Circuit A34

Order on remand dated December 9, 1975, United States District Court, Eastern District of Virginia A35-A36

DOCKET ENTRIES

73-663

Date	Proceedings
1973	
Dec. 26	Complaint, no jury, filed and summons issued.
1974	
Jan. 4	Marshal's return on summons, executed, filed.
Jan. 14	Motion for extension of time to file answer, filed by deft.
Jan. 14	Order granting leave to deft. to 1-31-74 to answer plf's complaint, ent. 1-14-74. Copies to counsel.
Jan. 31	Answer, no jury, filed.
May 2	Motion for Summary Judgment with affidavits filed by deft.
May 2	Memorandum in support of motion for summ. judgment, filed.
May 16	Order that plf. may respond in 10 days to deft's motion for summary judgment, ent. 5-16-74. Copies mailed counsel.
June 10	Pltf's Response & cross-motion for Summ. judgment, filed.
June 17	Deft's Response to pltf's cross-motion for summ. judgment, filed.
June 20	IN OPEN COURT: Merhige, J. Halasz, OCR Appearances: Parties by counsel. Matter came on for hearing on motions. OCR excused upon agreement of counsel. Deft's motion for summary judgment heard. Motion taken under advisement by the Court. Pltf's cross-motion for summary judgment heard. Motion taken under advisement by the Court. (30 Mins.)

Sept. 19 Memorandum filed.

Sept. 19 Order denying plaintiff's motion for summary judgment, defendant's motion for summary judgment is granted and the complaint herein stands dismissed, ent. 9-19-74 and filed. Copies to all counsel of record.

Oct. 11 Notice of appeal filed by Local 358.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

Civil Action
No. 73-663-R

LOCAL NO. 358, BAKERY AND CONFECTIONERY WORKERS INTERNATIONAL UNION, AFL-CIO,
Plaintiff,

vs.

NOLDE BROS., INC.,
Defendant.

COMPLAINT
(Breach of Collective Bargaining Agreement)
(Filed December 26, 1973)

1. This Court has jurisdiction of this cause of action under Section 301 of the Labor-Management Relations Act, 29 USC §185, and the United States Arbitration Act, Title 9 USC.

2. Plaintiff, hereinafter called the "Union," is an unincorporated association, a labor organization representing employees in an industry affecting commerce, having its principal place of business in Richmond, Virginia.

3. Defendant, Nolde Bros., Inc. hereinafter called the "Company," is a Virginia corporation, with its principal place of business in Richmond, Virginia and is engaged in the production and distribution of bakery products in and affecting interstate commerce.

4. The Union has been for many years in collective bargaining relationship with the Company regarding the wages, hours and working conditions in the Company's Norfolk plant and the most recent contract is dated July 28, 1970. A copy of this contract is attached hereto, marked Exhibit A.

5. Article IX, titled "Wages" of such collective bargaining agreement provides, *inter alia*, that:

> Section 5. Each full-time employee who is permanently displaced from his employment with the Company by reason of the introduction of labor saving equipment, the closing of a department, the closing of an entire plant, or by layoff, shall be employed by the Company for a period of at least three (3) years. An eligible employee's compensation for his displacement shall be on the basis of thirty (30) hours of severance pay, at his straight time hourly rate, for each full year or major portion of a year of active employment commencing with the fourth (4th) year following his most recent date of hire. Payment under this formula shall be limited to a maximum of nine hundred (900) hours of severance pay.
>
> Section 6. No severance pay will be paid to an eligible employee if he:
>
> (a) accepts employment in another plant of

the Company; or

(b) is voluntarily or involuntarily separated from his employment prior to the date he would otherwise be displaced for one of the reasons stated in Section 5 above.

Section 7. In the event an eligible employee wishes to remain on the plant seniority list, for the purpose of possible recall, he may elect to defer acceptance of his severance pay for a period of twelve (12) months. At any time during such period however, he may request his severance pay and his rights of recall and seniority shall terminate as of that date.

If such employee has not been recalled by the end of the twelve (12) month period he shall be paid his severance pay and his rights of recall and seniority shall terminate as of that date.

6. Article XII of the Agreement provides for final and binding arbitration of disputes arising under the Agreement.

7. In August, 1973, the Company, following a breakdown in the negotiation of a new collective bargaining agreement, announced that it was closing the plant permanently. The Union then requested the Company's assurances that the vacation and severance pay due the employees would be paid promptly. On September 19, 1973, the Company advised that it was in the process of calculating vacation pay and would forward it upon completion of such calculations. However, the Company advised that it was under no obligation to pay severance pay. A copy of the Company's letter is attached hereto as Exhibit B.

8. On October 2, 1873, following its unsuccessful attempts to resolve the dispute, the Union requested arbitration of the matter. By letter of October 11, 1973, the attorney for the Company advised the Union that its request for arbitration was denied since in the Company's view, termination of the Agreement of July 28, 1970 nullified the Company's obligation to arbitrate. A copy of that letter is attached as Exhibit C.

9. On October 19, 1973, the Union, through its attorneys, once more demanded arbitration of the vacation and severance pay issues. The Union pointed out that vacation and severance pay are vested rights accruing under the Agreement and that the right to these benefits does not expire under the Agreement. A copy of that letter is attached as Exhibit D hereof.

10. The Company has refused to comply in any manner with respect to severance pay obligations under said contract and has refused to provide the employees the severance pay due to them. Since, the employees have to their credit many years of seniority, the rights of severance pay have been built up over a good many years. For the Company now to seek to cancel its obligations is a clear violation of the vested property rights of said employees. As the Agreement of July 28, 1970, makes clear by its terms, severance pay is deferred "Wages" and it is wrongful of the Company to deprive these employees of monies they have earned over the years.

11. Vacation pay is deferred wages and since the employees have built up their rights to vacation pay based upon length of service, it is wrongful on the part of defendant Company to refuse to make payment of the vacation pay which has been earned by the employees during their years of service.

12. The Company has wrongfully and in violation of the collective bargaining agreement refused to submit to arbitration the questions concerning its obligations to pay severance and vacation pay.

WHEREFORE, plaintiffs request that this Court:

(1) issue judgment directing the defendant to submit to arbitration on the questions herein referred to and to proceed with said arbitration to final award; *or*

(2) in the alternative, grant plaintiffs direct and full relief on the questions herein referred to, including, but not limited to, an award of all severance pay and vacation pay monies due, plus interest; *and*

(3) award the plaintiffs the costs and disbursements of this action, attorneys fees and such other relief as the Court shall find appropriate.

Local No. 358, Bakery and Confectionery Workers International Union, AFL-CIO

By /s/ JJL
Counsel

Jay J. Levit
Stallard & Levit
1223-29 Cen. Natl. Bank Bldg.
Richmond, Virginia 23219

Ronald Rosenberg
Van Arkel & Kaiser
Suite 701, 1828 L Street, N.W.
Washington, D. C. 20036

Exhibit B

NOLDE BROTHERS
BAKERY
2520 East Broad Street
Richmond, Virginia 23223

September 19, 1973

Mr. Robert E. Gregory
Local No. 358
3108½ West Leigh Street
Richmond, Virginia 23230

Dear Mr. Gregory:

I have enclosed a copy of our Norfolk seniority list as you requested in your letter of September 7, 1973. We are currently in the process of calculating the vacation pay and will forward this to you as soon as it is completed.

Regarding your request for severance pay, Nolde Brothers Inc. is under no obligation to pay severance pay because any obligation on behalf of Nolde Brothers Inc. with respect to severance pay, ceased upon your termination of the collective bargaining agreement by your letter of August 20, 1973.

Sincerely,

Nolde Bros., Inc.
/s/ George F. Nolde, Jr.
George F. Nolde, Jr.
President

GFNjr/dw

Exhibit C

HUNTON, WILLIAMS, GAY & GIBSON
700 East Main Street P.O. Box 1535
Richmond, Virginia 23212
Telephone (804) 649-3661
Cable Huntwand

October 11, 1973

Mr. Robert E. Gregory
Bakery and Confectionery Workers'
International Union of America,
Local No. 358
3108-1/2 West Leigh Street
Richmond, Virginia 23230

Dear Mr. Gregory:

George F. Nolde, Jr., has referred to me your letter of October 2, 1973. As you know the obligation of Nolde Bros., Inc. to arbitrate any matter arising out of the collective bargaining agreement between itself and Local No. 358 covering the employees at the Norfolk bakery was an obligation founded only under the contract. When you chose to terminate the collective bargaining agreement, you nullified the entire contract, including the duty to arbitrate over a matter which arose after the agreement had lapsed.

Your request for arbitration is therefore denied. Should you have any further need to discuss this particular matter further, I would appreciate your contacting me directly rather than Mr. Nolde.

Very truly yours,

/s/ Francis V. Lowden, Jr.
Francis V. Lowden, Jr.

124/290

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division
(Title Omitted in Printing)

ANSWER

(Filed January 31, 1974)

Defendant, Nolde Bros., Inc., for its answer to the Complaint filed in the above matter says as follows:

1. With respect to the allegations in paragraph 1 of the Complaint Defendant denies that Plaintiff has properly invoked the jurisdiction of this Court under Section 301 of the National Labor Relations Act, 29 U.S.C. § 185 or under the United States Arbitration Act, 9 U.S.C. § 4, because there is not a written collective bargaining agreement in existence between the Plaintiff and Defendant and the existence of such a contract is a jurisdictional prerequisite for an action to proceed under 9 U.S.C. § 4 or 29 U.S.C. § 185.

2. Defendant admits the allegations in paragraph 2 of the Complaint.

3. Defendant admits the allegations in paragraph 3 of the Complaint.

4. Defendant admits that Plaintiff Union and Defendant Company have been parties to collective bargaining agreements wherein the subject matter concerned wages, hours and general working conditions for certain employees employed at Defendant's Norfolk Bakery plant. The last such collective bargaining agreement between the parties was entered into on or about July 28, 1970 and expired on August 27, 1973. There has been no collective bargaining contract in existence

between the parties covering the Norfolk Bakery since August 27, 1973.

5. With respect to paragraph 5 of the Complaint Defendant states that the language of the expired contract between the parties speaks for itself, but further answering Defendant denies that the provisions cited by Plaintiff have had any force or effect after August 27, 1973.

6. With respect to paragraph 6 of the Complaint Defendant states that the language of the expired contract between the parties speaks for itself, but further answering Defendant denies that the provisions cited by Plaintiff have had any force or effect after August 27, 1973.

7. Defendant denies the allegations contained in paragraph 7 of the Complaint, and further answering, states that on July 19, 1973 and on August 10, 1973 Plaintiff and Defendant conducted negotiations to seek a new collective bargaining agreement. The previous agreement was due to expire on July 21, 1973, although by its own terms the contract would continue in effect until a new agreement was reached or until the old agreement was terminated by either party upon seven (7) days notice. Such notice of termination was in fact given by Plaintiff by letter of August 20, 1973 (a copy of which is attached as Exhibit A) thereby terminating the collective bargaining agreement effective August 27, 1973. Thereafter, at a bargaining session on August 31, 1973, Plaintiff notified Defendant that its members had rejected Defendant's last offer. Plaintiff's representative then stated that unless the Defendant agreed to Plaintiff's last demand it would initiate a strike against Defendant. Defendant then determined

that it could not economically survive a strike and therefore announced the Bakery would permanently close effective August 31, 1973. Defendant subsequently paid all wages and accrued benefits, including vacation pay for vacations earned and due employees as of the date of the expiration of the agreement, i.e., August 27, 1973. Wages were also paid for any work performed after the expiration of the contract but prior to the permanent closing of the plant.

8. With respect to the allegations contained in paragraph 8 of the Complaint Defendant states that on October 2, 1973, Plaintiff did request Defendant to arbitrate the question of severance pay due under the expired agreement. Defendant notified Plaintiff that it was under no duty to arbitrate with respect to any grievance between the parties which arose after the expiration of the contract since the obligation to arbitrate such matters ceased after the Plaintiff caused the contract to be terminated.

9. Defendant admits to the existence of a letter dated October 19, 1973 from Plaintiff's counsel, but denies all allegations with respect to the legal status of any contractual matter between the parties.

10. Defendant denies all allegations in paragraph 10 of the Complaint, but states that it has refused to agree to submit to arbitration any disagreement which may exist between the Plaintiff and Defendant where the circumstances of such disagreement arose after August 27, 1973, the expiration date of the collective bargaining agreement between the parties.

11. Defendant denies the allegations contained in paragraph 11 of the Complaint, and further answering, states that vacation pay earned under the collective

bargaining agreement up to its expiration date of August 27, 1973, has been paid to all prior employees so entitled.

12. Defendant denies the allegations contained in paragraph 12 of the Complaint.

With respect to the prayer of the Complaint Defendant denies that Plaintiff is entitled to any relief whatsoever.

AFFIRMATIVE DEFENSES

First Defense: The Complaint contains no allegation that there is a written collective bargaining agreement in existence between Plaintiff Union and Defendant Company under which a duty to arbitrate existed at the time the disagreement arose between Plaintiff and Defendant. Without such a written extant contract this Court does not have jurisdiction over the subject matter contained in the Complaint.

Second Defense: The allegations contained in the Complaint fail to present any material facts as against unsupported legal conclusions and therefore the Complaint fails to state a claim against Defendant upon which relief can be granted.

Third Defense: With respect to any claim of vacation pay due under the expired agreement, Defendant states that any and all monies due have been paid and Defendant thereby pleads full accord, satisfaction and payment for any such claim to vacation pay.

Fourth Defense: With respect to any claim of breach of contract by Plaintiff against Defendant, the Defendant affirmatively states that Plaintiff is estopped from seeking any contractual relief, or in the alternative,

has waived any right to a contractual remedy by its conduct both prior to and after the expiration of the collective bargaining agreement previously in existence between the parties.

WHEREFORE, having duly answered, Defendant prays that this action be dismissed with prejudice and that Defendant be awarded its costs herein expended, including reasonable attorneys' fees.

Nolde Bros., Incorporated
By /s/ Jay T. Swett

Francis V. Lowden, Jr.
Jay T. Swett
Hunton, Williams, Gay & Gibson
700 East Main Street
Richmond, Virginia 23219

Exhibit A

BAKERY AND CONFECTIONERY WORKERS' INTERNATIONAL UNION OF AMERICA
LOCAL NO. 358
3108½ West Leigh Street, Richmond, Virginia 23230
Phone 359-6536

August 20, 1973

Mr. George F. Nolde, Jr., President
Nolde Brothers Bakery
2520 East Broad Street
Richmond, Virginia 23223

Dear Mr. Nolde:

This is to notify you that the Bakery and Confectionery Workers International Union of America,

Local No. 358, hereby gives seven days notice, in accordance with Article XIX of its current labor agreement, to cancel its current labor agreement covering the Company's Norfolk, Virginia Plant.

Very truly yours,

/s/ Robert E. Gregory
Robert E. Gregory
Business Representative

REG:jc
Certified Mail - Return Receipt Requested

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division
(Title Omitted in Printing)

MOTION FOR SUMMARY JUDGMENT

(Filed May 2, 1974)

Defendant, Nolde Brothers, Inc., respectfully moves the Court to grant summary judgment in its favor as to all of the matters raised in plaintiff's complaint. There are no genuine issues of material fact and defendant is entitled to a judgment as a matter of law. Defendant asks that the Court grant its Motion for Summary Judgment on the pleadings filed herein, on the affidavit of George F. Nolde, III and on the

Memorandum of Law in Support of Motion for Summary Judgment filed herewith.

Respectfully submitted,

Nolde Brothers, Inc.

By /s/ Francis V. Lowden, Jr.

Francis V. Lowden, Jr.
Jay T. Swett
Hunton, Williams, Gay & Gibson
P. O. Box 1535
Richmond, Virginia 23212

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division
(Title Omitted in Printing)

AFFIDAVIT

I, George F. Nolde, III, of the City of Richmond, State of Virginia, being first duly sworn, state the following:

I am the Treasurer of Nolde Brothers, Incorporated, whose address is 2520 East Broad Street, Richmond, Virginia. In addition to my functions as Corporate Treasurer, my duties also include representation of the Company in collective bargaining negotiations for the Company's plants.

Prior to August 31, 1973, the Company operated a bakery plant in Norfolk, Virginia. The Norfolk bakery's production and maintenance employees were represented by Local No. 358 of the Bakery and Con-

fectionery Workers International Union of America, AFL-CIO. Company records indicate that there have been collective bargaining agreements between Local No. 358 and the Company setting forth wages and conditions of employment for the Norfolk bakery since at least 1961. The last such agreement was for a three year period which, according to its terms, was in effect from July 19, 1970 until July 21, 1973. A copy of this agreement is attached to this Affidavit as Defendant's Exhibit No. 1.

During May of 1973, the Company received a letter dated May 16, 1973, from the Business Agent of Local No. 358. This letter is attached to this Affidavit as Defendant's Exhibit No. 2. In this letter the Union's Business Agent, Mr. Robert Gregory, notified the Company that the Union wished to open the contract for negotiating various changes. On or about June 6, 1973, the Company received the Union's initial proposal for modifying the contract. This proposal is attached to this Affidavit as Defendant's Exhibit No. 3.

The first negotiating session was held on July 19, 1973. Present at that meeting representing the Union was Mr. Gregory and representing the Company were Mr. George Nolde, Jr., myself and the Company's attorney, Francis V. Lowden, Jr., Esquire. During this meeting the Union requested a wage increase of 20 cents per hour for each year of the new contract and an increase of 22 cents per hour in fringe benefits. These requests were in addition to the contract proposals forwarded to the Company on June 6, 1973.

A second meeting was held on August 10, 1973. Mr. Gregory represented the Union and representing the Company were myself, Mr. Lowden and Mr. J. T.

Swett. During this meeting Mr. Gregory asked for a 16 cent per hour increase during the first year, and an 18 cent per hour increase for the second year of the contract in addition to a 14 cent per hour increase in fringe benefits.

The Union's offer was declined and during the second meeting the Company representative sought a six-month extension to the contract. The Company also offered a seven cent per hour increase in the pension plan retroactive to July 22, 1973 and some minor fringe benefit changes. During the August 10, 1973 meeting, the Union Business Agent showed the Company representatives a letter from the Bakery and Confectionery Workers International Union. Mr. Gregory stated that the letter from the International authorized Local No. 358 to call a strike at the Norfolk bakery if negotiations were not successful. The Union representatives were told that the Company could not stand a strike and a strike would definitely be the end of the bakery in Norfolk.

Some time after the August 10, 1973, meeting the Company learned that the members of Local No. 358 at the Norfolk bakery voted to reject the Company's last offer. The Company also received a letter dated August 20, 1973 from the Business Agent of Local No. 358 giving the seven-day written notice to terminate the labor contract. A copy of this letter is attached as Defendant's Exhibit No. 4.

A third and final negotiating session was held on August 31, 1973. Present at that meeting were Mr. George Nolde, Jr., myself, Mr. Lowden and Mr. Swett representing the Company. Mr. Gregory and Mr. Marvin Wallace represented the Union. Mr. Gregory

stated that the Norfolk employees had rejected the Company's last offer. Mr. Gregory also acknowledged that at that time the employees were temporarily working without a contract since his August 20, 1973 letter had terminated the old agreement as of August 28, 1973. The Company was told by Mr. Gregory that the Company must meet the Union's last proposal or the employees would go out on strike and establish a picket line at the Norfolk plant beginning on Tuesday, September 4, 1973.

A recess in the negotiations was called to discuss the ramifications of the Union's demands. We concluded that it was not economically feasible to operate the Norfolk bakery under the terms and conditions that were being demanded by the Union. It was also concluded that the Norfolk bakery could not withstand a strike because of the great many customers who would be permanently lost. Therefore, it was decided that the Norfolk operation would have to close.

Mr. George Nolde, Jr. then instructed Mr. Lowden that they should return to the meeting and Mr. Lowden should instruct the Union that the Norfolk bakery would be permanently closed effective the close of business on that day, August 31, 1973.

The Company sent telegrams to the Norfolk employees informing them of their termination due to the closing of the plant. Subsequently, the Union Business Agent requested that the Company calculate the amount of severance pay and vacation pay that would be due the Norfolk employees. A copy of this letter is attached to this Affidavit as Defendant's Exhibit No. 5.

The Company did calculate the vacation pay which had been earned, but not taken, prior to the expiration

date of the contract. This vacation pay was paid. However, it was discovered during the preparation for this case that not all the vacation pay was paid due to an error in the formula used. The Company is now in the process of correcting this error.

The Company declined to pay any severance pay since there was no contract at the time of the plant closing. A subsequent request for arbitration over severance pay was also declined.

/s/ George F. Nolde, III
George F. Nolde, III

(Jurat Omitted in Printing)

Exhibit 1

AGREEMENT

THIS AGREEMENT, made and entered into this 28th day of July, 1970, by and between NOLDE BROTHERS, INCORPORATED, for their Norfolk, Virginia plant, hereinafter called "Company" and Bakery and Confectionery Workers International Union of America, Local No. 358, affiliated with the Bakery and Confectionery Workers' International Union of America, AFL-CIO, hereinafter called "Union".

The joint purpose of this agreement is to secure industrial peace and efficiency, enabling the Company and its employees to provide, as far as economic conditions may permit, security and continuity of employment, and to set forth a basic understanding relative to rates of pay, hours of work, and conditions of employment.

ARTICLE I

RECOGNITION AND REPRESENTATION

Section 1. The Company hereby recognizes the Union as the exclusive representative for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment of the employees at the Company's Norfolk, Virginia plant, in classifications listed in Appendix A hereto.

Section 2. During the first thirty (30) days of employment, the Company shall be the sole judge of whether an employee shall be continued in employment.

Section 3. When and if the appropriate laws permit, a Union security clause will be inserted in the Agreement. This Union security clause shall only become effective after all regulations regarding such Agreements have been complied with in full.

ARTICLE II

SENIORITY

Seniority shall be on a plant-wide basis for promotions, lay-offs, and recalls. Job vacancies shall be posted and open for bids for 72 hours. Vacancies shall be filled on the basis of seniority and ability equally considered.

Promoted employees shall be on trial on the new job for not longer than fifteen (15) days.

Job classification seniority will rule for the selection of shifts and hours at time of permanent vacancies and in case of demotions, providing qualifications are fitting.

The Company agrees to notify the Union every two weeks of all new employees hired and any lay-offs.

There shall be no obligation on the Employer to recall an employee who has been on lay-off for twelve (12) months.

ARTICLE III

HOLIDAYS

Section 1. All employees shall receive the following holidays with eight (8) hours' straight time pay: New Year's Day, Memorial Day, July 4th, Labor Day, Thanksgiving Day, and Christmas Day; provided, however, that in order to receive pay for any such holiday the employee must have been at work on the workday next preceding and the workday next following such holiday; and provided further that employees may be required to work on such holiday if given another day in said work week for such holiday or the holiday pay hereinabove provided for in addition to the regular pay for time worked during said week. Absences due to bona fide sickness prior to and after a holiday shall be excusable and the employee shall receive his or her holiday pay, providing such employee has performed work within two (2) weeks prior to the holiday week or during the holiday calendar week. Overtime at the rate of time and one-half to be paid after thirty-two (32) hours in a holiday week.

Section 2. The employee's birthday shall be an additional holiday.

(a) If an employee's birthday falls on a scheduled day off, eight (8) hours, at straight time pay, shall be added to his pay. (Article VI, Section 7, shall not apply to fifth day worked in a birthday week.)

(b) If an employee's birthday falls within a holiday work week, he shall be given the holiday seven (7) days thereafter.

(c) Where a number of employees' birthdays fall on the same day, so that production difficulties are involved, the holiday for such employees shall be rescheduled according to seniority.

ARTICLE IV

VACATIONS

Section 1. Each full time employee is entitled to one week's vacation after one year's service, two (2) weeks' vacation after two (2) years' service, three (3) weeks' vacation after nine (9) years' service, and four (4) weeks' vacation after eighteen (18) years' service.

Effective January 1, 1971, the service requirement for the third (3rd) week of vacation shall be reduced to eight (8) years.

Effective January 1, 1972, the service requirement for the fourth (4th) week of vacation shall be reduced to seventeen (17) years.

Effective January 1, 1972, each employee with twenty-five (25) or more years of service shall be entitled to a vacation benefit of five (5) weeks.

Section 2. The anniversary date of employment shall be adjusted by periods of lay-offs or leaves of absence for the purpose of computation of vacation benefits only.

Section 3. Vacation pay shall be based on straight time at the employee's regular hourly rate for the average number of hours worked by the employee in the

thirteen (13) weeks preceding the vacation period, not including holiday weeks or weeks in which time is lost on account of sickness, with a minimum of forty (40) hours' pay and a maximum of forty-eight (48) hours' pay for each week of the vacation allowance.

Section 4. Preference in the assignment of vacation periods shall be on a seniority basis, subject to the maintenance of regular production schedules.

Section 5. If one of the holidays listed in Article III falls within an employee's vacation, he or she shall be paid a sum equal to eight (8) hours' straight time pay in addition to vacation pay. All employees to receive their vacation pay before the vacation starts.

Section 6. A regular employee who has completed at least one year of service and is discharged, laid off, or resigns, before having satisfied the requirements for a full vacation shall be entitled to pro-rata vacation payment in lieu of time off, based on the number of months of continuous service worked beyond his last anniversary date of employment. It is further understood that said employee must have worked a minimum of sixty (60) days beyond said anniversary date to be eligible for a pro-rated vacation payment. Pro-rated vacation payments shall be based on one-twelfth (1/12) of a full vacation (as outlined in Section 1 of this Article) for each month worked for which the employee has not received a vacation. This clause shall be applicable to employees who are inducted under the Selective Servicemen's Act.

ARTICLE V

UNION BENEFITS

Section 1. The Company agrees, if humanly possible, to give time off without pay to any officer of the Union, who may have any Union business to which he has to attend. Also, in the event that the Union should select a Business Representative from the employees who may be employed by the Company, the Company agrees to let said employees leave the employ of the Company with the understanding that he may return at any time with comparable standing and seniority.

Section 2. Bulletin Boards to be placed at each time clock shall be furnished by the Company for Union notices, which will first be submitted for approval of the management. A signed copy of this contract will be posted on each bulletin board.

Section 3. The Business Representative, bearing credentials from the Union, shall be allowed in any shop during working hours, upon securing permission from the Manager and provided there shall be no interference with work.

Section 4. During the life of this Agreement and, in accordance with the provisions of Section 302 (c) of the Labor-Management Relations Act of 1947 and with the terms of a form of authorization for check-off of dues agreed to by the parties hereto, the Company agrees to deduct union membership dues and/or initiation fees, levied in accordance with the constitution and by-laws of the "Union", from the pay of each employee who signs the authorization.

Check-off deductions shall begin with the month following the month that the Company receives the authorization. Thereafter, the Company will deduct the membership dues and/or initiation fees from the first pay period in each succeeding month in which the employee has sufficient net earnings to cover the union membership dues and/or initiation fees.

ARTICLE VI

HOURS OF WORK AND OVERTIME

Section 1. The regular work week shall be forty (40) hours to be completed in not more than five (5) days.

Section 2. Each full time employee who reports for work, upon request, as required by his department's schedule is guaranteed pay for such week equivalent to not less than forty (40) hours at the employee's regular straight time hourly rate. This guarantee of forty (40) hours' pay is contingent upon there being no emergency condition, beyond the Company's control, which prevents or interferes with the normal operation of the business.

Section 3. Each employee who reports for work upon request on any one day, as required by his department's schedule, shall be guaranteed not less than seven (7) hours pay for that day at his regular straight time hourly rate, provided he does whatever work is assigned to him.

Section 4. Each employee shall be paid for all work performed in excess of eight (8) hours per day or forty (40) hours in any one week at the rate of one and one-half (1½) times the employee's regular straight time hourly rate.

Section 5. Each employee who is required to work six days in any regularly scheduled work week shall be paid at the rate of one and one-half (1½) times his regular straight time hourly rate of pay for all hours worked on such employee's sixth day.

Section 6. Each employee who is required to work seven days in any regularly scheduled work week shall be paid at the rate of twice his regular straight time hourly rate of pay for all hours worked on such employee's seventh day.

Section 7. During a holiday week each employee who is required to work five days shall be paid at the rate of time and one-half his regular straight time hourly rate of pay for all hours worked on such employee's fifth day, and each employee who is required to work six or seven days shall be paid at the rate of twice his regular straight time hourly rate of pay for all hours worked on such employee's sixth or seventh day.

Section 8. There shall be no pyramiding of overtime premium payments under any of the provisions of this contract, that is, the same hours shall not be reflected more than once for overtime purposes but shall be paid for on the applicable daily basis, or weekly basis, whichever is the greater, but not on both.

Section 9. Each employee who works between the hours of 6:00 P. M. and 6 A. M. shall be paid for all work between such hours, in addition to the regular pay to which he would be otherwise entitled, night premium compensation of seven cents (7¢) per hour at straight time.

Section 10. Necessary physical relief will be granted without discrimination from any source.

Section 11. Each employee shall have a rest period of at least twelve (12) hours between each day's work and an intermission of at least thirty-six (36) hours on the days each week on which he is regularly scheduled off. Employees scheduled off two consecutive days shall have an intermission of fifty-four (54) hours. Hours taken from the rest period or intermission shall be paid for at the overtime rate of time and one-half.

Section 12. Maintenance and/or garage mechanics called in outside of regular working hours shall be guaranteed not less than two (2) hours' pay at time and one-half their regular straight time hourly rate plus one (1) hour's traveling time at their straight time hourly rate for such call.

Maintenance and/or garage mechanics receiving pay under this section shall not receive additional compensation for the same hours under Section 11 of this same Article.

Section 13. No employee shall be given time off for the purpose of offsetting overtime.

Section 14. Each employee shall have a lunch period of thirty (30) minutes after three hours and completed before 5½ hours of work, which lunch period will not be paid for or be included in working hours.

Section 15. Schedules shall be posted on Friday showing the working days of all employees for the following week.

Section 16. The Company shall have the right to employ per diem personnel to be known as jobbers.

Section 17. Each employee shall be given a ten (10) minute paid rest period before and after lunch

each day. If an employee is going to be required to work nine (9) or more hours he shall also be given an additional ten (10) minute rest period as near after the end of his eighth (8th) hour of work as possible.

ARTICLE VII

GROUP INSURANCE

Section 1. The Company agrees to maintain its present group insurance plan during the terms of this agreement with the following improvements:

Effective August 1, 1970, daily Room and Board Benefits shall be up to $40.00 per day.

Effective August 1, 1970, Hospital Miscellaneous Benefits shall be up to $800.00 per disability.

Effective August 1, 1972, Daily Room and Board Benefits shall be up to $50.00 per day.

Effective August 1, 1972, Hospital Miscellaneous Benefits shall be up to $1,000.00 per disability.

Effective August 1, 1972, X-Ray and Lab Fees outside of hospital up to $50.00.

ARTICLE VIII

NATIONAL PENSION FUND

Section 1. The Company hereby agrees to be bound as a party by all the terms and provisions of the Agreement and Declaration of Trust dated January 13, 1958, as amended, establishing the American Bakery and Confectionery Workers' Union and Industry Pension Fund (hereinafter called the Fund), and said Agreement is made part hereof by reference.

Section 2. The Company agrees to pay to the Fund the sum of sixteen cents (16¢) for each hour for which employees receive pay as required under the provisions of this collective bargaining agreement, provided that in no event shall such contribution by the Company for an employee for any one week exceed the sum of six dollars and forty cents ($6.40).

Effective August 1, 1971, such contribution shall be twenty-two cents (22¢) for each hour not to exceed eight dollars and eighty cents ($8.80) per week.

Effective August 1, 1972, such contribution shall be twenty-six cents (26¢) for each hour not to exceed ten dollars and forty cents ($10.40) per week.

Section 3. The payments made in accordance with Section 2, above shall be allocated as follows:

Sixteen cents (16¢) per hour to provide coverage under Plan A;

Effective August 1, 1971, twenty-two cents (22¢) per hour to provide coverage under Plan A.

Effective August 1, 1972, twenty-six cents (26¢) per hour to provide coverage for an Age and Service Pension (Plan C).

Section 4. The payments so made to the Fund shall be used by it to provide retirement benefits for eligible employees in accordance with the Pension Plan of said Fund, as determined by the Trustees of said Fund, to be applied to the eligible employees based on the amount of the Company contribution. The Company hereby affirms that he has no arrangement providing for the compulsory retirement of his employees except as specifically set forth herein.

Section 5. It is understood and agreed that the Pension Fund referred to herein shall be such as will qualify for approval by the Internal Revenue Bureau of the United States Treasury Department, so as to allow the Company an income tax deduction for the contributions paid hereunder.

Section 6. This Article encompasses the sole and total agreement between the Company and the Union with respect to pensions or retirement.

Section 7. This Article is subject in all respects to the provisions of the Labor-Management Relations Act of 1947, as amended, and to any other applicable laws.

Section 8. Effective August 1, 1970, employees employed in the Garage and Thrift Store shall be covered under the Fund.

ARTICLE IX

WAGES

Section 1. The rate of pay of employees covered by this Agreement shall be not less than the rate appearing in Schedule "A" attached hereto and made a part hereof.

Section 2. There shall be no reduction of wages of any employee who receives more per week than provided for in this Agreement.

Section 3. Under no circumstances shall employees be paid less than their regularly weekly or hourly rate even though at times they are used on less paying jobs unless permanently transferred.

Section 4. If an employee be assigned to a higher paid job or jobs for more than one-half hour per day,

he shall be paid the rate of the higher paid job for the time used.

Section 5. Each full-time employee who is permanently displaced from his employment with the Company by reason of the introduction of labor saving equipment, the closing of a department, the closing of an entire plant, or by lay off, shall be compensated for such displacement providing he has been actively employed by the Company for a period of at least three (3) years. An eligible employee's compensation for his displacement shall be on the basis of thirty (30) hours of severance pay, at his straight time hourly rate, for each full year or major portion of a year of active employment commencing with the fourth (4th) year following his most recent date of hire. Payment under this formula shall be limited to a maximum of nine hundred (900) hours of severance pay.

Section 6. No severance pay will be paid to an eligible employee if he:

(a) accepts employment in another plant of the Company; or

(b) is voluntarily or involuntarily separated from his employment prior to the date he would otherwise be displaced for one of the reasons stated in Section 5 above.

Section 7. In the event an eligible employee wishes to remain on the plant seniority list, for the purpose of possible recall, he may elect to defer acceptance of his severance pay for a period of twelve (12) months. At any time during such period however, he may request his severance pay and his rights of recall and seniority shall terminate as of that date.

If such employee has not been recalled by the end of the twelve (12) month period he shall be paid his severance pay and his rights of recall and seniority shall terminate as of that date.

ARTICLE X

MEDICAL EXAMINATIONS

Section 1. The Company agrees to pay for any doctor's examination which may be necessary to obtain employment in the bakery.

ARTICLE XI

FOREMEN

Section 1. No foreman or supervisor shall perform any of the duties of any employee coming under the jurisdiction of this contract except in cases of emergency or relief.

ARTICLE XII

GRIEVANCES AND ARBITRATION

Section 1. All grievances shall be first taken up between the Plant Management and the Shop Steward. If these parties shall be unable to settle the grievance, then the Business Agent of the Union shall be called in, in an attempt to arrive at a settlement of the grievance. If these parties are unable to settle the grievance, the dispute will be settled as called for in Sections 2 and 3 of this Article.

Section 2. In the event that any grievance cannot be satisfactorily adjusted by the procedure outlined above, either of the parties hereto may demand arbitration and shall give written notice to the other party of its desire to arbitrate. No individual employee shall

have the right to invoke arbitration without the written consent of the Union. The Arbitration Board shall consist of three (3) persons, one selected by the Company and one selected by the Union. The two persons selected shall agree upon a third person who shall act as Chairman of the Arbitration Board.

Section 3. The decision or award of the Arbitration Board, or a majority thereof, shall be final and binding on both parties. If the third party to arbitration is not selected in ten (10) days from receipt of notice, the Director of the U. S. Conciliation Service shall be requested to make the appointment. The expense of the neutral arbitrator shall be borne equally by the parties.

Section 4. Pending negotiations or during arbitration there shall be no strikes, lock-outs, boycotts, or any stoppages of work.

ARTICLE XIII

JURY DUTY

The Company will pay an employee serving on jury duty the difference between fees paid him by public authority for such service and straight time earnings for the time which such service forces him to lose from his regularly scheduled hours of work. The time of such jury service shall not be counted as time worked in computing overtime.

ARTICLE XIV

ABSENCE BECAUSE OF DEATH

In case of death of an employee's father, mother, sister, brother, husband, wife, son, daughter, mother-in-law, or father-in-law, and such employee finds

it necessary to take time off to pay proper respect to the deceased and provided he attends the funeral, said employee will be paid straight time pay for the time he is off from his regularly scheduled work not to exceed three days of eight (8) hours each, provided such employee notifies a representative of the Company before absenting himself from work.

ARTICLE XV

MILITARY SERVICE

The Company and the Union agree to abide by the terms of the Selective Service and Training Act as amended from time to time or any other applicable law.

ARTICLE XVI

NO STRIKE

The Union agrees that there will be no strikes by members of the Union during the life of this Agreement, unless the Company refuses to comply with the arbitration provision of Article XII. The Company agrees that there will be no lockouts during the life of this Agreement.

ARTICLE XVII

UNION LABEL

It is agreed that the Company shall use the Union Label of the Bakery and Confectionery Workers' International Union of America, AFL-CIO, on its principal bread items and, in its discretion may use such label on any of its other products, in conformity with the rules and regulations of the Union Label Agreement entered into with the Union.

ARTICLE XVIII

NO WORK ON STRUCK GOODS

The Union does not guarantee that its members will pass through a picket line if any union, or unions, or organized groups of employees are on strike, or are locked out, and the Union has notified the Company in writing that such strike or lock-out is in progress.

It shall not be deemed a violation of this Agreement for employees covered hereunder, to refuse to bake, work on, or produce bakery products for any other bakery where a strike is in effect and where an authorized picket line is being maintained, if such refusal is not in violation of the Labor-Management Relations Act of 1947.

ARTICLE XIX

TERMS

This Agreement shall be in full force and effect from July 19, 1970, until and including July 21, 1973, and thereafter, until a new Agreement (the terms of which shall be retroactive to the above given date) has been consummated and signed, or this Agreement, after the expiration date, has upon seven days written notice been cancelled or terminated by the Local Union with the sanction of the Bakery and Confectionery Workers' International Union of America, AFL-CIO, or by the Employer.

IN WITNESS WHEREOF the Company and the Union have each caused this Agreement to be executed

in its behalf by its proper officers hereunto authorized this 31st day of July, 1970.

For the Company:
By: /s/ George F. Nolde, Jr.
President

For the Union:
By: /s/ Robert E. Gregory
Business Representative

NOLDE BROTHERS, INCORPORATED

NORFOLK, VIRGINIA

SCHEDULE "A"

	RATES EFFECTIVE				
	7/19/70	7/18/71	1/16/72	7/16/72	1/21/73
CLASSIFICATIONS					
MIXER AND INGREDIENT SCALER	$ 3.32	$ 3.52	$ 3.62	$ 3.82	$ 3.92
DIVIDER OPERATOR	3.11	3.31	3.41	3.61	3.71
MOLDER OPERATOR	3.11	3.31	3.41	3.61	3.71
OVEN, FEED AND DELIVERY	3.08	3.28	3.38	3.58	3.68
WRAPPING MACHINE SETTERS	3.12	3.32	3.42	3.62	3.72
WRAPPING MACHINE FEEDERS	2.94	3.14	3.24	3.44	3.54
FLOUR BLENDERS	2.98	3.18	3.28	3.48	3.58
HELPERS (ADVANCED)	2.92	3.12	3.22	3.42	3.52
HELPERS	2.86	3.06	3.16	3.36	3.46
CHECKERS	3.08	3.28	3.38	3.58	3.68
MAINTENANCE MECHANICS	3.50	3.70	3.80	4.00	4.10
MAINTENANCE HELPERS	3.08	3.28	3.38	3.58	3.68
THRIFT STORE HELPERS	2.65	2.85	2.95	3.15	3.25
GARAGE MECHANICS *	3.03	3.38	3.56	3.84	4.02

* Effective January 17, 1971, the rate of the Garage Mechanic shall be increased in the amount of Seven Cents (7¢).
Effective July 15, 1973, the rate of the Garage Mechanic shall be increased Eight Cents (8¢).

New inexperienced help will receive ten cents (10¢) less for the first ninety (90) days.

A jobber shall receive the rate of the classification in which he works.

Exhibit No. 2

BAKERY AND CONFECTIONERY WORKERS'
INTERNATIONAL UNION OF AMERICA
LOCAL NO. 358

3108½ West Leigh Street, Richmond, Virginia 23230
Phone 359-6536

May 16, 1973

Mr. George Nolde, Jr., President
Nolde Brothers Bakery
2520 East Broad Street
Richmond, Virginia 23223

Dear Mr. Nolde:

This is to advise you pursuant to the provisions of Section 8 (d) of the Labor Management Relations Act of 1947 that we wish to open our present agreemwnt with your Company for the purpose of negotiating certain changes.

We will gladly meet with you at a time and place mutually agreeable to both parties.

Yours truly,

/s/ Robert E. Gregory
Robert E. Gregory
Business Representative

REG:jc

cc: Mr. Vaughan Ball

Certified Mail—Return Receipt Requested

Exhibit No. 3

BAKERY AND CONFECTIONERY WORKERS'
INTERNATIONAL UNION OF AMERICA
LOCAL NO. 358

3108½ West Leigh Street, Richmond, Virginia 23230

Phone 359-6536

June 6, 1973

Mr. George Nolde, Jr.
Nolde Brothers Bakery
2520 East Broad Street
Richmond, Virginia 23223

Dear Mr. Nolde:

Enclosed is a copy of the Proposed Contract Changes for your Norfolk, Virginia Plant.

We will be glad to meeting with you at any mutually convenient time to discuss these changes. I would like to suggest June 20th for our first meeting date. Please advise me accordingly.

Yery truly yours,

/s/ Robert E. Gregory
Robert E. Gregory
Business Representative

REG:jc

Enclosure

NOLDE BROTHERS BAKERY
PROPOSED CONTRACT CHANGES

1. New Section—Both of the parties to this Agreement agree that they will not discriminate against any employee, or prospective employee, because of his age, race, sex, creed, color, national origin or union affiliation.
2. Fourth week vacation after fifteen years of service.
3. Article VI, Section 3—be amended to eight (8) hours daily guarantee.
4. Prior notice of Overtime Work—
   An employee must be given as much notice as is possible in the event he is going to be required to work overtime.
5. Article VIII—
   Use revised clause as adopted by Board of Trustees
   Increase contribution to provide:
   $ 300.00 Normal Pension Plan, A, costs additional 12¢
   $ 300.00 Vested Rights Plan B, Costs additional 6¢
   $ 300.00 Age and Service Plan C, costs additional 2¢
   Hospital—Surgical benefits for retirees Plan W1, costs additional 2¢
6. Employee to be credited with one day sick leave per month.
7. New Article XVIII to read as follows:
   PICKET LINES—
   It shall not be a violation of this Agreement, nor shall it be a cause for discharge or other disciplinary action if any employee refuses to enter upon property involved in a primary labor dispute, or if he refuses to go through or work behind any primary picket line, including the primary picket line of the Union, including primary picket lines at the Company's places of business.
8. Substantial wage increase.
9. When an employee works at least twenty four hours a week for four consecutive weeks the employee shall be classified on the higher rated job.
10. Criteria to become an advanced helper:
    After six months a helper shall be paid advanced helper rate.
11. Garage mechanic adjustment additional 8 cents per hour.
12. Wants an up to date Seniority List.

Exhibit No. 4

BAKERY AND CONFECTIONERY WORKERS'
INTERNATIONAL UNION OF AMERICA
LOCAL NO. 358

3108½ West Leigh Street, Richmond, Virginia, 23230
Phone 359-6536

August 20, 1973

Mr. George F. Nolde, Jr., President
Nolde Brothers Bakery
2520 East Broad Street
Richmond, Virginia 23223

Dear Mr. Nolde:

This is to notify you that the Bakery and Confectionery Workers International Union of America,

Local No. 358, hereby gives seven days notice, in accordance with Article XIX of its current labor agreement, to cancel its current labor agreement covering the Company's Norfolk, Virginia Plant.

Very truly yours,

/s/ Robert E. Gregory
Robert E. Gregory
Business Representative

REG:jc
Certified Mail—Return Receipt Requested

Exhibit No. 5

BAKERY AND CONFECTIONERY WORKERS'
INTERNATIONAL UNION OF AMERICA
LOCAL NO. 358
3108½ West Leigh Street, Richmond, Virginia 23230

Phone 359-6536

September 7, 1973

Mr. George F. Nolde, Jr., President
Nolde Brothers Bakery
P. O. Box 8035
Richmond, Virginia 23223

Dear Mr. Nolde:

During contract negotiations for the Norfolk Plant I had requested an up to date seniority list, showing dates of employment, classifications and wage rates. I would appreciate receiving this seniority list as soon as possible.

I would also like to have the following information on each employee from the Norfolk Plant:

The amount of vacation earned as of their last anniversary date and the amount of pro-rata vacation earned from the last anniversary date until September 1, 1973; and

The amount of severance pay that is due each employee.

With best wishes, I remain

Very truly yours,

/s/ Robert E. Gregory
Robert E. Gregory
Business Representative

REG:jc

CERTIFIED MAIL—RETURN RECEIPT REQUESTED

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

(Title Omitted in Printing)

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, AND PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

(Filed June 10, 1974)

Defendant, Local No. 358 (hereinafter referred to as "Union"), respectfully moves the Court to deny defendant's motion for summary judgment, and to grant summary judgment in plaintiff's favor. There are no genuine issues of material fact with respect to plain-

tiff's cross-motion for summary judgment and plaintiff is entitled to a judgment as a matter of law. Plaintiff asks that the Court deny defendant's motion for summary judgment, and that the Court grant plaintiff's cross-motion for summary judgment on the pleadings filed herein, on the affidavit of Robert E. Gregory, and on the memorandum of law filed herewith.

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

(Title Omitted in Printing)

AFFIDAVIT

I, Robert E. Gregory, of the City of Richmond, State of Virginia, being first duly sworn, state the following:

I am the Business Representative for Local No. 358 of the Bakery and Confectionery Workers International Union of America. I participated in and represented the Union in the third and final contract negotiations which were held on August 31, 1973.

During the course of that meeting, the Company took a recess, and at the end of the recess announced for the first time its intention to close down the plant permanently that night. I advised the Company repsentatives that the employees would be entitled to their vested severance pay rights along with their vested vacation pay if the Company were to close down. At the time of these discussions, the Company had not closed down its operations, and thereafter its operations

continued past midnight into the next day. At no time did the employees go out on strike. From the time the collective bargaining agreement expired up to and including the time the Company closed down its operation, the employees worked for the Company under the same terms and conditions of employment as contained in the expired collective bargaining agreement.

The intention of my August 20, 1973 letter, which is Exh. 4 to the Company's motion for summary judgment, was to give the Company a chance to prepare itself for any possible strike, such as disposing of refrigerated merchandise. The seven day's notice given in my August 20, 1973, letter was the result of a request made by the Company in negotiations many years before for this purpose. The parties always intended to continue the wages, hours and working conditions specified in the expired collective bargaining agreement so long as the employees continue to work during negotiations for a new agreement. This was the past practice of the parties as well.

/s/ Robert E. Gregory
Robert E. Gregory

(Jurat Omitted in Printing)

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

(Title Omitted in Printing)

ORDER

(Filed September 19, 1974)

For the reasons stated in the memorandum of the Court this day filed, it is ADJUDGED and ORDERED that plaintiff's motion for summary judgment be, and the same is hereby, denied; the motion of defendant for summary judgment be, and the same is hereby, granted, and the complaint herein stands dismissed.

Let the Clerk send a copy of the memorandum and this order to all counsel of record.

/s/ Robert R. Merhige
United States District Judge

Dated: September 19, 1974

Supreme Court, U. S.
FILED
APR 14 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1198

NOLDE BROTHERS, INCORPORATED, *Petitioner*,

v.

LOCAL NO. 358, BAKERY & CONFECTIONERY WORKERS UNION, AFL-CIO, *Respondent*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

The sole question presented [1] is whether a court or an arbitrator should decide a claim that a particular labor agreement requires payment of severance pay accrued

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[1] Petitioner does not seek review of the question on which Judge Widener dissented—the scope of the arbitrator's authority to consider arbitrability following referral. The Court of Appeals was unanimous in concluding that the matter be referred to arbitration.

during the contract term when the employee is severed after contract expiration. Review is unwarranted because the question arises solely from the Fourth Circuit's interpretation of the contract in this case, and is clearly answered under well-established doctrines of this Court.

This Court has recently reiterated the "now well-known presumption of arbitrability for labor disputes" and the need for reliance upon "the special expertise of the labor arbitrator, with his knowledge of the common law of the shop." *Gateway Coal* v. *Mine Workers,* 414 U.S. 368, 377, 379 (1974). In reliance upon these long-standing precedents and its own finding that the parties here had agreed upon an "all-encompassing arbitration clause" (A. 2) [2] to resolve contractual disputes, the Fourth Circuit correctly concluded that the arbitrator, rather than a court, had been entrusted with authority to decide this contract issue.

Petitioner claims, however, that a court should decide this particular contract dispute. The court below concluded that an arbitrator should; that conclusion follows this Court's mandate, announced in the most forceful language imaginable in *United Steelworkers* v. *Warrior & Gulf Nav. Co.,* 363 U.S. 574 (1960) and reaffirmed in *Gateway Coal* (414 U.S. at 377-378):

> "(a)n order to arbitrate the particular grievance shall not be denied unless it may be said with positive assurance that the arbitration clause is not

[2] The Court of Appeals properly described the arbitration clause here as "all-encompassing," for it had no limitations or exclusions whatever. Indeed, the clause is even broader than the "standard form" arbitration clause referred to by the Court in *United Steelworkers* v. *American Mfg. Co.,* 363 U.S. 564 at 565 & N. 1 (1960).

> susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *United Steelworkers* v. *Warrior & Gulf Nav. Co.* 363 U.S. 574, 582-583 (1960).

The decision of the Court of Appeals here was explicitly based on its reading of the particular agreement between the parties and not, as Petitioner claims, upon the view that the obligation to arbitrate arises solely by operation of law. The Court below concluded that "[w]e simply hold that the company must abide by that agreement [to arbitrate] even after the contract embodying it has terminated." (A. 10). Non non-contractual obligation was imposed upon the company. The Court of Appeals noted that:

> "The company does not deny that the contract by its terms contemplated arbitration of any dispute over severance pay. Thus is it clear that the company literally agreed to arbitrate any issue of its obligation for severance pay." A. 10.

The Court concluded that the parties intended that disputes as to severance pay were to be arbitrable "even if the contingency giving use to the dispute itself transpired after the expiration of the contract." (A. 9)

Certainly, the parties could have agreed that *all* determinations of rights created under their agreement were to be made by an arbitrator possessing "special expertise" in this area rather than by a relatively untutored court.[3] They could have agreed that employees

[3] Severance pay disputes of the type involved here have been "grist for arbitrators' mills" for many years. The overwhelming and long-standing view among labor arbitrators is that employees accrue severance pay and are entitled to the payment whether dismissed during the contract or at any time thereafter. It is the

were to accrue rights to severance pay during the term of the agreement and that those rights could be realized after the expiration of the comprehensive collective agreement. They could also have agreed that their arbitrator would decide disputes regarding the amount or appropriateness of severance pay in those instances. Since the "all-encompassing arbitration clause" between Petitioner and the union was certainly "susceptible of an interpretation" that such disputes were arbitrable, the Court of Appeals correctly concluded that the severance pay dispute should be decided by the arbitrator rather than a court.

The Court of Appeals' interpretation of the contract is consistent with this Court's decisions in *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543 (1964) and *Piano & Musical Instrument Workers Union* v. *W. W. Kimball Company*, 379 U.S. 357 (1964). In *Wiley*, a union sought arbitration of its claim that a successor employer (Wiley) was not only obligated to honor the collective bargaining agreement of its predecessor (Interscience) for the balance of its term, but also was obligated to abide by certain provisions of the contract—including the severance pay provision—even after the agreement expired. The employer argued that it was not bound by the prior employer's agreement, but that even if it was, it was not required to arbitrate claims

labor arbitrator's background and familiarity with these normal expectations of the parties to a collective bargaining agreement that underscores the importance that questions of contract interpretation be decided through the contractually designated method. See, e.g., opinion of Willard Wirtz, *In re Brooklyn Eagle, Inc.*, 32 Lab. Arb. 156, 160-161 (1959); *H. K. Porter Co.*, 49 Lab. Arb. 146 (1967); note, *Termination of Collective Bargaining Agreements—Survival of Earned Rights*, 54 Northwestern L. Rev. 646, 647-48 (1959).

which "relate to a period beyond the limited terms of the agreement." *Id.* at 554. This Court ordered arbitration of the union's claims for post-expiration rights (*id.* at 555):

> "As to claimed rights 'after January 30, 1962' [the expiration date of the agreement], it is reasonable to read the claims as based solely on the Union's construction of the Interscience agreement in such a way that, had there been no merger, Interscience would have been required to discharge certain obligations notwithstanding the expiration of the agreement. We see no reason why parties could not if they so chose agree to the accrual of rights during the term of an agreement and their realization after the agreement had expired. . . .

In *Piano Workers*, this Court summarily reversed the Seventh Circuit's denial of arbitration for seniority claims made after the contract expiration date. The Seventh Circuit had expressly predicated its conclusion that arbitration was unavailable on the finding that there were no pre-expiration disputes, the very contention advanced by the instant Petitioner. The propositions involved were so well-established that this Court considered extended discussion unnecessary and ordered arbitration, citing only *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960) and *Wiley*.[4]

[4] Nothing in this Court's opinion in *Howard Johnson* v. *Hotel Employees*, 417 U.S. 249 (1974), detracts from the applicability of *Wiley* and *Piano Workers*. Howard Johnson itself had never signed a contract; the seller (Grissom) in *Howard Johnson* conceded its obligation to arbitrate. Since here Petitioner, like Grissom, was itself a consenting party to an agreement to arbitrate, its obligation springs from its own express contractual undertaking and does not violate any countervailing public policy supporting the free transfer of capital. 417 U.S. at 255.

No labor policy is impaired by permitting the arbitrator rather than a court to decide the severance pay issue. To the contrary, this Court and the Board have repeatedly referred to the public policy favoring arbitration rather than judicial resolution of such contract disputes. Nothing in *Howard Johnson*, 417 U.S. 249 (1974), or in the solitary Labor Board decision cited by Petitioner suggests that "what the Union seeks here is completely at odds with the basic principles . . ." enunciated by this Court or the Board.[5] The Board held only that it was not a refusal to bargain for a party to refuse to arbitrate "post-contract grievances" after an agreement had expired.[6] That Board opinion does not suggest that a court rather than an arbitrator should decide contract claims concerning accrued rights under a pre-existing agreement.

The remainder of the Petition is devoted to a misleading recitation of the few lower court decisions allegedly analogous to the present case. The Fourth Circuit explicitly and accurately distinguished those cases in which arbitration was sought for claims that "on their face" were not based on the collective bargaining agreement itself, e.g., discharges after the expiration of the contract. (A. 12-13) Since the essence of the *Steelworkers Trilogy* is that arbitration is the favored mechanism where a dispute "on its face is governed by the contract,"[7] these courts were correct in refusing

[5] As noted, *Howard Johnson* merely reiterates this Court's concerns that legal doctrine not impede the public policy favoring the free transfer of capital and the resuscitation of moribund businesses. *Howard Johnson Company* v. *Hotel Employees*, 417 U.S. 249 at 261.

[6] *Hilton Davis Chemical Company*, 185 NLRB 241 (1970).

[7] *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. at 568 (1960).

to order arbitration of claims that had no contractual predicate. Indeed, both the Second and Tenth Circuit opinions relied upon by Petitioner expressly distinguished claims based on accrued rights;[8] the District of Columbia case involved "negotiation" of a benefit, not an accrued right.[9] The overwhelming weight of authority from these and other lower courts supports the decision of the Court below.[10]

The main case relied upon by Petitioner, the decision of the Sixth Circuit in *I.A.M. Local Lodge 2369* v. *Oxco Brush Division*, 517 F.2d 239 (6th Cir. 1965), is clearly distinguishable since the parties there had contractually withdrawn from the arbitrator the authority to award "compensation, damages, or other redress to any employee or the Union." 517 F.2d at 242. Since the employees in *Oxco Brush* sought "com-

[8] *M.K.O. Transit Lines, Inc.* v. *Division No. 892*, 319 F.2d 488 (10th Cir. 1963) involved the terms of a new contract and the court expressly distinguished cases where ". . . the sustained arbitration was with reference to accrued though continuing rights under the terminated agreement." 319 F.2d at 491.

Flight Engineers Int'l Assoc., EAL Chapter v. *Eastern Air Lines*, 359 F.2d 303 (2d Cir. 1966) expressly notes that an arbitration board ". . . was still the forum for the assertion of rights which had arisen while the collective bargaining agreement was still in effect. . . . But no such rights are asserted here." 359 F.2d at 310.

[9] The Fourth Circuit distinguished *Milk Drivers Local 246* v. *Thompson's Dairy*, 489 F.2d 1272 (D.C. Cir. 1974): the unreported portion of the District of Columbia Court's memorandum made clear that no contract claim was made, since the company's only obligation was to negotiate. A. 13, n. 7.

[10] See, e.g., *Local Lodge No. 595, IAM* v. *Howe Sound*, 350 F.2d 508 (3d Cir. 1965); *Local 4, IBEW* v. *Radio Thirteen-Eighty, Inc.*, 469 F.2d 619 (8th Cir. 1972); *United Steelworkers* v. *H. K. Porter*, 64 LRRM 2202 (W.D. Pa. 1966).

pensation" (vacation pay), the arbitrator would have been powerless to resolve the dispute. Moreover, the *Oxco Brush* Court found in the union's favor on the merits in reliance on its own strong precedents dealing with the substantive issue of vacation pay. The Court's haste to decide the merits rather than refer it to an arbitrator with contractually limited power is therefore understandable, though inconsistent with this Court's decisions. *Oxco*'s analysis of the arbitration question is superficial and unpersuasive, failing to cite *Local Lodge No. 595, IAM* v. *Howe Sound Co.*, 350 F.2d 508 (3d Cir. 1965). *Howe Sound* is so clearly correct that our Petitioner earlier conceded, on *Howe*'s authority, that arbitration would be the proper forum for vacation disputes of the type involved there and in *Oxco*.[11] For these reasons, the *Oxco* decision is of limited consequence.[12]

Petitioner's notion that the question presented is "new" and its ramifications "immense" are merely exaggerated rhetoric commonly engaged in by one seeking review. In fact, the general propositions are "well-known", *Gateway Coal* v. *Mine Workers, supra,* and the application of those propositions to the particular

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[11] In its brief to the Fourth Circuit, Petitioner concedes that claims of the type involved in *Oxco* are arbitrable:

> "Obviously, where a right had accrued during the term of a contract, such as vacation earned under the terms of the contract, but not taken, the right to enforce such a vested right in arbitration arises under the contract and survives its termination. *Local Lodge No. 595 IAM* v. *Howe Sound Co.*, 350 F.2d 508 (3d Cir. 1965)." Brief for Appellee, p. 6.

[12] *OCAW International Union* v. *American Maize Products,* 492 F.2d 409 (7th Cir. 1974), cert. denied, 417 U.S. 969 (1974), also relied upon by Petitioner, involved a lockout following the expiration and not accrued rights.

question here has been addressed by this Court in *Wiley* and *Piano Workers.* Each of the Company's questions at pp. 13-14 of the Petition are therefore easily answered by reference to this Court's consistent line of authority:

1. The duty to arbitrate extends for the same time as the right to enforce the claim judicially. The court would hear these questions if the parties had not agreed to refer their disputes to a labor arbitrator and the arbitrator's authority is coterminous with that of a court. *Steelworkers Trilogy; Wiley; Piano Workers; Gateway Coal.*

2. The duty to arbitrate extends to each dispute that "on its face is governed by the contract" where it cannot be said "with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *United Steelworkers* v. *American Manufacturing, Gateway Coal* v. *Mine Workers, United Steelworkers* v. *Warrior and Gulf Nav. Co.*

3. A party may limit its contract obligation to arbitrate by a "specific exclusion" from the arbitration clause. Otherwise, a party can no more terminate a contract obligation to arbitrate any more than it can terminate any other contract obligation it has undertaken. *Wiley; Piano Workers.*

4. Arbitration of a claim based upon the accrued rights of the employees under the previous agreement is proper where the arbitration clause is susceptible of interpretation that covers the dispute. *Gateway Coal; Wiley; Piano Workers.* A prominent authority, W. Willard Wirtz, long ago concluded that the employees

had a right to severance pay in precisely the circumstances Petitioner outlines. See *Brooklyn Eagle,* 32 Lab. Arb. 156 (1959).

5. A union may not strike if the underlying agreement so provides, either expressly or by implication. *Gateway Coal.*

By reason of the extraordinary clarity and forcefulness of this Court's many opinions in this area and of the carefully limited nature of the Court of Appeals' indisputably correct decision, review is unwarranted. There is no need for this Court to reiterate once again its consistent conclusion that arbitrators and not courts are to decide contractual disputes under labor agreements.

Respectfully submitted,

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April 14, 1976

Supreme Court, U. S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1198

NOLDE BROTHERS, INCORPORATED,
Petitioner,

vs.

LOCAL NO. 358, BAKERY & CONFECTIONERY WORKERS UNION, AFL-CIO,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 530 F 2d 548, 91 LRRM 2570. (P.A. 1-22)[1] The opinion of the District Court is reported at 382 F Supp 1354, 87 LRRM 2646. (P.A. 24-33)

JURISDICTION

The judgment of the Court of Appeals was entered October 23, 1975 (P.A. 1); the timely petition for re-

1. The designation "P.A....." refers to pages in the appendix in the petition for writ of certiorari; the designation "A" refers to pages in the single appendix before this Court.

hearing and suggestion for rehearing en banc was denied on November 26, 1975. (P.A. 23) The petition for writ of certiorari, filed on February 21, 1976, was granted on May 19, 1976. Jurisdiction of this Court rests on 28 USC §1254(1).

QUESTION PRESENTED

Is an employer required to arbitrate a dispute between the employer and a union where the dispute did not arise until after the union terminated the parties' agreement to arbitrate, notwithstanding the United States Supreme Court's ruling that an obligation to arbitrate a labor dispute arises solely from a contract between the parties and not by operation of law?

STATEMENT OF THE CASE

Nolde Brothers, Incorporated (the Company) and Local No. 358 Bakery & Confectionery Workers International Union (the Union) were parties to a collective bargaining contract entered into on July 28, 1970, covering certain employees of the Company's Norfolk, Virginia bakery. (A. 16, 19-37) Included in the contract was a severance pay provision. (A. 3, 31-32) The contract, which provided for a mandatory grievance-arbitration procedure[2] (A. 4, 32-33), was to remain in

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2. "Article XII. Grievances and Arbitration.

Section 1. All grievances shall be first taken up between the Plant Management and the Shop Steward. If these parties shall be unable to settle the grievance, then the Business Agent of the Union shall be called in, in an attempt to arrive at a settlement of the grievance. If these parties are unable to settle the grievance, the dispute will be settled as called for in Sections 2 and 3 of this Article.

Section 2. In the event that any grievance cannot be satisfactorily adjusted by the procedure outlined above, either of the

full force and effect until July 21, 1973 and thereafter until a new agreement had been reached and executed, or until either the Union or the Company terminated or cancelled the agreement by giving seven days' written notice to the other. (A. 16, 35)[3]

On May 16, 1973 the Union advised the Company pursuant to §8(d) of the National Labor Relations Act (29 USC §158[d]) that it wished to negotiate certain changes in the existing contract. (A. 16, 38) The parties commenced bargaining and negotiated for approximately three months. (A. 16, 39) At the second bargaining session, the Company offered to extend the contract for six months with some increases in the

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(Footnote Continued)

parties hereto may demand arbitration and shall give written notice to the other party of its desire to arbitrate. No individual employee shall have the right to invoke arbitration without the written consent of the Union. The Arbitration Board shall consist of three (3) persons, one selected by the Company and one selected by the Union. The two persons selected shall agree upon a third person who shall act as Chairman of the Arbitration Board.

Section 3. The decision or award of the Arbitration Board, or a majority thereof, shall be final and binding on both parties. If the third party to arbitration is not selected in ten (10) days from receipt of notice, the Director of the U. S. Conciliation Service shall be requested to make the appointment. The expense of the neutral arbitrator shall be borne equally by the parties.

Section 4. Pending negotiations or during arbitration there shall be no strikes, lock-outs, boycotts, or any stoppages of work."

3. Article XIX of the contract provided as follows:

"This Agreement shall be in full force and effect from July 19, 1970, until and including July 21, 1973, and thereafter, until a new Agreement (the terms of which shall be retroactive to the above given date) has been consummated and signed, or this Agreement, after the expiration date, has upon seven days written notice been cancelled or terminated by the Local Union with the sanction of the Bakery and Confectionery Workers' International Union of America, AFL-CIO, or by the Employer."

fringe benefits provided in the contract but the Union rejected this offer. (A. 17) On August 20, 1973 the Union wrote the following letter to the Company:

> "This is to notify you that the Bakery and Confectionery Workers International Union of America, Local No. 358, hereby gives seven days notice, in accordance with Article XIX of its current labor agreement, to cancel its current labor agreement covering the Company's Norfolk, Virginia Plant." (A. 41-42)

Thus, as of August 27, 1973 the contract between the parties had been cancelled and terminated as provided in Article XIX.

At a bargaining session held August 31, 1973, the Union rejected the Company's last offer and, acknowledging that the employees were working without a contract, stated that the Union would strike unless the Company agreed to the Union's proposals. (A. 17-18) After consideration of the Union's position, the Company advised the Union that it would permanently close its Norfolk bakery and did permanently cease operations at that bakery on August 31, 1973. (A. 18, 44)

Subsequent to the plant closing and after the Union's termination of the contract, the Union made a demand for severance pay and further demanded that the Company arbitrate the issue as to whether the released employees were entitled to severance pay. (A. 18-19) The Company refused the Union's claim for severance pay (A. 7) and refused to arbitrate the issue of whether the employees were entitled to severance pay. (A. 8, 19) The Company's position was that both the right to severance pay and the duty to arbitrate

were solely creatures of the contract which the Union had terminated and cancelled. (A. 7, 8, 12, 19)

The Union then instituted this action in the District Court for an order compelling arbitration of the severance pay issue which arose after the Union terminated the agreement to arbitrate or, in the alternative, for an order awarding severance pay to the released employees. (A. 1, 2-6) On the parties' cross motions for summary judgment, the District Court held that the Union's voluntary termination of its collective bargaining contract (including the arbitration agreement) had terminated the Company's duty to arbitrate any grievance arising thereafter and had extinguished any obligation to pay severance pay. (A. 2, 46; P.A. 24-33)

After timely appeal by the Union, the Court of Appeals for the Fourth Circuit reversed the judgment of the District Court and held that the severance pay dispute should be submitted to arbitration even though the parties' agreement to arbitrate had expired. (P.A. 1-22) Each member of the three-judge panel wrote a separate opinion, one judge dissenting in part. (P.A. 1-22) Circuit Judge Craven ruled that the employees' right to severance pay depended upon the intent of the parties and that "[a]ny question of the intent behind a collective bargaining term must be referred to arbitration. . . ." (P.A. 5) In his opinion, Judge Craven took the position that although there was no agreement to arbitrate "either when the dispute arose or when suit [to compel arbitration] was filed" the Company could be compelled to arbitrate the severance pay grievance because in the terminated labor contract the Company "literally agreed to arbitrate any issue of its obligation for severance pay." (P.A. 8-10)

While Judge Craven recognized that certain disputes arising after the termination of the contract were not arbitrable (P.A. 12) and that the Company cannot have been considered to agree to arbitrate certain disputes "for all time", Judge Craven concluded that the severance pay grievance involved an "accrued" right and, hence, the "best way" to resolve the dispute and the result serving "the most basic policy of our labor laws" was to compel the Company to arbitrate. (P.A. 12-13) Judge Aldrich concurred with Judge Craven. (P.A. 13-14) Judge Widener concurred in the order to arbitrate but dissented to the extent that the order precluded the Company from submitting the question of its duty to arbitrate to the arbitrator. (P.A. 14-22)

SUMMARY OF ARGUMENT

The Union and the Company were parties to a labor contract which included a provision for the arbitration of disputes. The Union terminated the contract in anticipation of a strike against the Company. Subsequent to the Union's termination of the contract, a dispute arose between the parties concerning events occurring after the termination of the contract, and the Union is attempting to compel the Company to submit the dispute to arbitration even though at the time the events occurred the parties were not bound by an agreement to arbitrate.

Frequently characterized as a "creature of contract", arbitration is purely a consensual process and the duty to arbitrate only extends to disputes arising when the parties are contractually bound to arbitrate. No obligation to arbitrate a dispute arises by operation of law. Because the dispute between the Company and

the Union arose when there was no agreement to arbitrate disputes between them, the Company cannot be compelled to arbitrate the dispute.

Federal labor policy established by Congress is designed to insure that collective bargaining occurs when a majority of employees in an appropriate unit desire collective bargaining. But federal labor policy also strictly prohibits the courts or the National Labor Relations Board (the Labor Board) from imposing terms of agreement on the parties. To compel the Company to arbitrate a grievance which arose when the Company had not consented to arbitration violates federal labor policy.

The Labor Board which in the Congressional legislative scheme is the primary regulator of the collective bargaining process has held that an employer has no duty to arbitrate grievances arising during the hiatus after the expiration of one labor contract and prior to the execution of another labor contract. The Labor Board's interpretation of federal labor policy cannot be disregarded in cases arising under §301.

The Fourth Circuit's opinion violated federal labor policy by effectively rewriting the parties' contract to provide terms and conditions to which the parties had not agreed. The parties had agreed that their entire contract could be terminated but the Fourth Circuit imposed an exception to that agreement by holding that their agreement to arbitrate could not be terminated. Thus, the Fourth Circuit expanded the parties' contract. The error of the Fourth Circuit's analysis is demonstrated by the fact that, in other respects, the Fourth Circuit effectively narrowed the scope of the parties' contract as follows: The contract provided that

"all grievances" were to be arbitrated; yet, the Fourth Circuit held that after the contract was terminated, the parties had to arbitrate only some grievances. While this Court has held that the extent of the duty to arbitrate must be determined only on the basis of the parties' contract, the Fourth Circuit's opinion regarding the duration of the Company's obligation to arbitrate is based on the Court's characterization of the nature of the right involved in the grievance and the nature of the dispute between the parties.

ARGUMENT

I. The Company Cannot Be Compelled to Arbitrate the Grievance Because the Union and the Company Were Not Subject to an Agreement to Arbitrate When the Facts Giving Rise to the Grievance Occurred

There is no dispute of material fact in this case; the Union is attempting to compel the Company to arbitrate a grievance based upon events occurring after the Union terminated the parties' labor contract, including the provisions therein requiring the arbitration of grievances. As the Fourth Circuit stated in its majority opinion below, "there was [no binding contract with an arbitration clause in existence] . . . either when the dispute arose or when suit was filed." (P.A. 8) The Company submits that neither labor nor management can be compelled to arbitrate a grievance unless at the time the grievance arose the party was bound by a contract in which it consents to arbitrate grievances.

The most fundamental characteristic of arbitration is that it is a result of the agreement of the parties.

"The law compels a party to submit his grievance to arbitration only if he has consented to do so." *Gateway Coal Co.* v. *United Mine Workers*, 414 US 368, 374 (1974). A collective bargaining relationship can exist for decades but unless and until the parties mutually agree to submit grievances to arbitration, they cannot be compelled to arbitrate anything. As Justice Brennan stated in his concurring opinion in *Steelworkers* v. *American Manufacturing Company*, 363 US 564, 570 (1960):

> "The arbitration promise is itself a contract. The parties are free to make their promise as broad or as narrow as they wish, for there is no compulsion in law requiring them to include any such promises in their agreement."

Because the duty to arbitrate is a "matter of contract" (*Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 US 574, 582 [1960]), this Court has held that before any party can be required to arbitrate any dispute, there must first be a finding that "the parties are subject to an agreement to arbitrate." *Operating Engineers, Local 150* v. *Flair Builders, Inc.*, 406 US 487, 491 (1972); *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 US 574, 582 (1960). Thus, neither the Company nor the Union could be compelled to arbitrate the severance pay grievance because, at the time the grievance arose, they were not subject to an agreement to arbitrate and "[n]o obligation to arbitrate a labor dispute arises solely by operation of law." *Gateway Coal Co.* v. *United Mine Workers*, 414 US 368, 374 (1974).

II. Federal Labor Policy Prohibits a Court From Imposing Compulsory Arbitration on Labor or Management Where the Parties Are Not Bound by an Agreement to Arbitrate

Commencing with the National Labor Relations Act (29 USC §151 et seq.)—the nation's principal labor law—federal labor policy as established by Congress has been designed to insure "that employees as a group could express their opinions and exert their combined influence over the terms and conditions of their employment" through bargaining. *H. K. Porter Co., Inc.* v. *NLRB*, 397 US 99, 103 (1970). The Labor Act prohibits both labor and management from refusing to bargain in good faith where the bargaining obligation exists.[4] And arbitration is "a part of the continuing collective bargaining process." *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 US 574, 581 (1960).

But, one of the "fundamental policies" in this system of industrial self-government is "freedom of contract" and neither the Labor Board nor a court can either compel the parties to reach agreement on any issue or rewrite the parties' agreement to impose additional or other undertakings besides those agreed to by the parties. 29 USC §158(d);[5] *H. K. Porter, Inc.*

4. 29 USC §§158(a)(5) and 158(b)(3).

5. In relevant part 29 USC §158(d) provides: "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating

v. *NLRB, supra*, 397 US at 108-109. It follows that under our system of industrial democracy which compels collective bargaining where the employees desire to bargain collectively, "whether or not the company was bound to arbitrate . . . is a matter to be determined . . . on the basis of the contract entered into by the parties." *Atkinson* v. *Sinclair Refining Co.*, 370 US 238, 241 (1962). Even though, as a matter of law, the parties may be required to bargain collectively, the parties' duty to arbitrate cannot be extended beyond their contractual undertaking to arbitrate because the contract—not the law—forms the "basis" for the undertaking. In light of this clear federal labor policy which requires bargaining but which strictly prohibits the imposition of terms of agreement on the parties, the Labor Board has rejected the argument that a party who was at one time subject to an agreement to arbitrate could be compelled to arbitrate disputes arising after the agreement to arbitrate expired:

> "The mutual commitment of contract parties to consider interstitial disputes through a grievance procedure and, failing agreement, to submit them to binding arbitration is a voluntary surrender of the right of final decision which Congress has reserved to these parties. Indeed, each such agreement is a vindication of Congress' judgment: the parties have not only bargained to agreement, they have undertaken to continue to 'bargain' (in the

(Footnote Continued)

any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession."

sense of meeting at reasonable times and seeking agreement in good faith) about the application of their agreement to the facts of their particular relationship. They have further agreed, where arbitration has been accepted, voluntarily and mutually to surrender the use of their respective economic weapons in favor of third party determination of unresolved issues. The consequent reduction of industrial strife is widely celebrated and has led to a declared national policy encouraging arbitration. Section 203(d), Labor Management Relations Act, 29 U.S.C., Section 173(d); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 US 574 (1960). But we must not be induced by that policy or its benefits to overlook that aribtration is, at bottom, a consensual surrender of the economic power which the parties are otherwise free to utilize. Absent mutual consent, the parties revert to the statutory scheme of 'free' collective bargaining, wherein each party must attempt in good faith to reach agreement, but is under no statutory mandate to reach agreement or to forfeit its right to utilize its economic power if no agreement can be achieved.

"The courts have repeatedly recognized this concept. [citations omitted]

* * *

"Applying these principles to the hiatus which sometimes exists—and existed here—between the expiration of one agreement and the reaching of a new one, it follows that employers and unions must continue to meet and confer and to seek agreement in good faith, not only over the terms and conditions of a proposed new agreement, but also over

employee grievances which may arise during such hiatus. But it does not follow that during such period the law requires the parties to submit to arbitration any grievance which they are unable to resolve." *Hilton Davis Chemical Company*, 185 NLRB 241, 242 (1970).

From the Congressional mandate and the opinions of this Court, the Labor Board correctly concluded that no policy of the nation's labor laws would be served by compelling labor or management to arbitrate disputes where, as here, one of the parties had terminated and cancelled the agreement to arbitrate.[6]

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6. The result reached by the Labor Board follows logically from the nature of the duties arising from the collective bargaining relationship. Under the Labor Act, a newly certified labor organization which engages in collective bargaining with the employer of the employees which it represents cannot compel that employer to arbitrate any dispute arising between the parties prior to an agreement between labor and management that certain disputes will be arbitrated. Due to the operation of law and absent the union's agreement, the employer cannot change the terms and conditions of employment of its represented employees without first negotiating to an impasse with the union about such changes. However, there is no duty to arbitrate changes in conditions, challenged management action, individual grievances or any other complaint unless and until the employer is bound by an agreement to arbitrate. The effect of the Fourth Circuit's opinion in the instant case is that once labor or management has contractually agreed to arbitrate but the agreement to arbitrate expires, either party is in a different position than it was in prior to any agreement to arbitrate. Yet, the controlling fact in either circumstance is that there is no agreement to arbitrate and absent that agreement, the parties are left free to take whatever lawful action they can to compel the other side to concede to their positions or demands. Other obligations also expire at the ending of the contract. See *Sargent-Welch Scientific Co.*, 208 NLRB 811, 815 (1974). Recognizing that the duty to arbitrate is solely a creature of contract (i.e., cannot arise without a binding contract requiring arbitration), the Labor Board in *Hilton Davis Chemical Company* correctly ruled that once the agreement to arbitrate has expired, the duty to arbitrate also expires, notwithstanding the fact that by operation of law—not contract—the collective bargaining process continues, just as in the period prior to the execution of the initial arbitration agreement.

"By looking at the policy of [federal] legislation", this Court has formulated federal labor policy in those areas lacking "express statutory sanctions" (*Textile Workers* v. *Lincoln Mills*, 353 US 448, 457 [1957]) and, at times, has relied upon the Labor Board's judgment regarding issues before the Court in Section 301 (29 USC §185) cases, which issues also arise under the Labor Act. *E.g.*, *Howard Johnson Company* v. *Detroit Joint Board, Hotel & Restaurant Employees*, 417 US 249 (1974); *Local 174, Teamsters* v. *Lucas Flour*, 369 US 95, 105 (1962). Indeed, this Court has held that it would be "plainly inconsistent" with *Lincoln Mills* to allow the "policies found controlling in an unfair labor practice context [to] . . . be disregarded by the courts in a suit under Section 301 and thus to permit the rights enjoyed by [a party] . . . to depend upon the forum in which the union presses its claims." *Howard Johnson Company* v. *Detroit Joint Board, Hotel & Restaurant Employees*, 417 US 249, 256 (1974). The Fourth Circuit's opinion in the instant case disregarded "the policies found controlling in an unfair labor practice context", by rejecting the teachings of *Hilton Davis Chemical Company* that in our system of free collective bargaining, a party cannot be compelled to arbitrate a dispute arising after the termination of its arbitration agreement.

The 1947 amendments (61 Stat. 136) to the Labor Act support the conclusion that arbitration cannot be compelled in the circumstances presented in this case. While Congress stated its preference for voluntary dispute resolution procedures agreed upon by the parties as "the desirable method for settlement of grievance disputes", Congress specifically qualified its preference to relate only to those disputes "arising

over the application or interpretation of an *existing* collective bargaining agreement." Labor Management Relations Act, §203(d) (1947), 29 USC §173(d) (Emphasis added)[7]. Congress' insertion of the word "existing" in Section 203(d) was apparently intended to reject any connotation that Congress believed compulsory arbitration of labor disputes to be consistent with or a part of federal labor policy. See, Sen. Rep. No. 105 on S 1126, 80th Cong., 1st Sess. p. 28, I Leg. History 434; 93 Cong. Rec. 3951-3952 (1947), II Leg. Hist. 1008 (remarks of Senator Taft). The preference for arbitration in some circumstances was never intended to be an inroad on the Congressional mandate establishing our system of industrial democracy wherein labor and management are free to exert their economic strength against each other unless there is a binding agreement to the contrary between them. Thus, the Fourth Circuit misreads federal labor legislation by stating that the "most basic policy" of federal labor law is the preference for arbitration. As demonstrated by the opinions of this Court under that legislation, federal labor policy is designed, first, to allow a bargaining relationship to exist where a majority of employees in an appropriate bargaining unit so desire; second, to allow the parties to reach a contract through free collective bargaining involving lawful economic action by either party; and, third, to insure that the parties can be compelled to abide by that contract during its term. *H. K. Porter Co., Inc.* v. *NLRB*, *supra*; *Textile Workers* v. *Lincoln Mills*, *supra*, 353

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7. As this Court stated in *Steelworkers* v. *American Manufacturing Company*, *supra*, 363 US at 567:

> "Arbitration is a stabilizing influence only as it serves as the vehicle for handling any and all disputes that *arise under* the agreement." (Emphasis added)

US at 453. Notwithstanding its preference for arbitration as the means to settle labor controversy where arbitration is agreed to in an "existing" labor contract, Congress has never required, and this Court has never found any labor policy to compel the parties to arbitrate any dispute they have not consented to arbitrate when the dispute arises.

In light of express Congressional policy, the opinions of this Court and the rulings of the Labor Board, it is not surprising that the Courts of Appeal have understood that federal labor policy does not require an employer to arbitrate grievances arising after the expiration of the labor contract. *Local 58, United Rubber, Cork, Linoleum & Plastic Workers of America, AFL-CIO* v. *Sun Products Corporation*, 521 F 2d 1286 (6 Cir., 1975) and *IAM Local Lodge 2369* v. *Oxco Brush Division*, 517 F 2d 239 (6 Cir., 1975) held that an employer is not required to arbitrate a dispute concerning "accrued" vacation pay where the dispute arises after the labor contract terminated and after the employer permanently ceased operations. In *OCAW International Union* v. *American Maize Products Company*, 492 F 2d 409, 412 (7 Cir.), *cert. denied*, 417 US 969 (1974), the court rejected an attempt by a union to compel the employer to arbitrate either the propriety of the employer's lockout of whether the employer could hire temporary replacements during the lockout.[8] The Seventh Circuit correctly ruled that the

8. Similarly, in *Flight Engineers Int'l Assoc., EAL Chapter* v. *Eastern Air Lines, Inc.*, 359 F 2d 303, 309 (2 Cir., 1966), the court refused to compel an employer subject to the Railway Labor Act to submit to a system board of adjustment (which the court noted was comparable to an arbitration panel) a dispute concerning the temporary replacement of strikers arising after the termination of the parties' contract. *See Local 1251, UAW* v. *Robertshaw Controls Co.*, 405 F 2d 29 (2 Cir., 1968); *Procter & Gamble Ind. U.* v.

nature of the grievance did not control the duty to arbitrate and that once the agreement to arbitrate was terminated, the employer could not be compelled to arbitrate disputes arising thereafter. And the District of Columbia Circuit affirmed a District Court judgment that:

> "Since the collective bargaining agreement between plaintiff and defendant had terminated prior to the time defendant went out of business, no dispute regarding severance pay could arise under the contract and as a matter of Law there could be nothing to arbitrate." *Milk Drivers Local No. 246* v. *Thompson's Dairy, Inc.*, 80 LRRM 3403, 3404 (DDC, 1972), *aff'd mem.* 489 F 2d 1272, 85 LRRM 2405 (DC Cir., 1974).

III. The Fourth Circuit's Opinion and Order Is Clearly Inconsistent With National Labor Policy

The Fourth Circuit concedes that at least "individual employee grievances" or "disputes involving non-accruable rights" which arise after the expiration of the labor contract are not arbitrable because the arbitration agreement is terminated at that time. Yet, the Court decided that the Union's severance pay grievance should be arbitrated even though it arose after the contract was terminated. (P.A. 12) The Court points to nothing in either federal labor policy or in the parties' terminated arbitration agreement (which it is supposedly enforcing) upon which to base its decision that after the

(Footnote Continued)

Procter & Gamble Mfg. Company, 312 F 2d 181 (2 Cir., 1962), *cert. denied*, 374 US 830 (1963). *Ward Foods, Inc.* v. *Local 50, B&CW*, 360 F Supp 1310 (SD NY, 1973) (relying on *Flight Engineers Int'l Assoc.* v. *Eastern Air Lines, Inc., supra*, to hold that an employer could not be compelled to arbitrate a claim for severance pay arising after the termination of the labor contract.).

contract expired some grievances are arbitrable but others are not arbitrable.

The labor contract provided that "all grievances" would be submitted to arbitration but the Court said that as a matter of law at certain times only some grievances would be submitted to arbitration. The labor contract provided that either party could terminate or cancel the contract but the Fourth Circuit ruled that the agreement to arbitrate some (but not all) grievances would be extended in perpetuity regardless of the termination or cancellation of the contract. In essence, what the Fourth Circuit has done is to rewrite the parties' agreement to change its express scope and duration.

If the parties had desired to continue their contract in effect or continue the duty to arbitrate perpetually as to all or some issues, they could have easily accomplished this by so stating in their agreement. But in this case nothing in the labor contract even suggests that the parties agreed to arbitrate disputes over events occurring after the contract expired. Only by judicially rewriting the parties' arbitration agreement could the Fourth Circuit find that their duty to arbitrate extended to disputes arising after one of the parties terminated the contract.

This Court has held that the extent of the obligation to arbitrate must be determined upon "the contract entered into by the parties" (*Atkinson* v. *Sinclair Refining Co., supra,* 370 US at 241); the Fourth Circuit instead based its determination upon its characterization of the nature of the right claimed ("accruable" P.A. 9, 12-13) and its characterization of the nature of the dispute involved (regarding the "intent of the parties" [P.A. 5, 13]). While the Fourth Circuit concluded

the "best way" to resolve the severance pay grievance was in arbitration, the Fourth Circuit should have determined whether "the parties were subject to an agreement to arbitrate." *Operating Engineers, Local 150* v. *Flair Builders, Inc., supra,* 406 US at 491. Absent the parties' mutual and binding agreement to arbitrate, there was no duty to arbitrate, regardless of the Court of Appeals' belief as to the preferred way to resolve the dispute.

The Fourth Circuit's opinion relied upon *John Wiley & Sons* v. *Livingston,* 376 US 543 (1964), and *Piano and Musical Instrument Workers Union* v. *W. W. Kimball Company,* 379 US 357 (1964). But nothing in those decisions supports the radical idea that parties can be compelled to arbitrate disputes where they are not bound by an arbitration agreement. In fact, in *Wiley,* this Court underscored the very point that:

> "[J]ust as an employer has no obligation to arbitrate issues which it has not agreed to arbitrate, so *a fortiori,* it cannot be compelled to arbitrate if an arbitration clause does not bind it at all." *John Wiley & Sons* v. *Livingston, supra,* 376 US at 547.

This is a clear and forceful statement that the duty to arbitrate cannot arise unless there exists a binding arbitration clause at the time the dispute arises.

Moreover, the question in *Wiley*—which was the Court's "first experience with the difficult 'successorship' question"[9] (an issue not at all involved in this case)—was whether Wiley could be considered bound by the predecessor's agreement to arbitrate; *Wiley*

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9. *Howard Johnson Company* v. *Detroit Joint Board, Hotel & Restaurant Employees, supra,* 417 US at 254.

assumes that there had to be an agreement to arbitrate before there could be a duty to arbitrate. The whole point of the union's argument in *Wiley* was to demonstrate that the entity which had survived the merger was bound by the existing labor contract and, therefore, had to arbitrate the grievances. In both *Wiley* and *Howard Johnson*, this Court reaffirmed its position that there would be no duty to arbitrate unless there was an "express or implied assumption of the agreement to arbitrate." *Howard Johnson Company* v. *Detroit Joint Board, Hotel & Restaurant Employees*, *supra*, 417 US at 264. In *Wiley*, the successor's assumption of the agreement to arbitrate resulted from the state law regulating mergers of entities in that state. Thus, as a matter of law, the surviving entity became a party to an agreement to arbitrate which was in existence when the arbitrable disputes arose; if the state law had not made Wiley an effective party to the arbitration agreement, then the duty to arbitrate would not have arisen because otherwise Wiley was not a party to an agreement to arbitrate.

This Court's *per curiam* opinion in *Piano Workers* does not support the Fourth Circuit's statement that *Piano Workers* is a case in which arbitration was compelled where there was no existing arbitration agreement at the time the grievance arose. (P.A. 9) In *Piano Workers*, the Seventh Circuit had held that the employer did not have to arbitrate certain grievances because, first, the record before the Court failed to demonstrate "that defendant during the term of the agreement in any way violated the seniority rights of its employees"; and, second, "during the term of the agreement there was never any *difference* between the parties to this case in regard to seniority rights as to

employment at French Lick. . . ." *Piano and Musical Instrument Workers Union* v. *W. W. Kimball Co.*, 333 F 2d 761, 765 (7 Cir. 1964). The labor contract stated that the parties would arbitrate "differences" which "cannot be settled directly by the parties concerned" at the earlier steps in the grievance procedure. *Id.* at 762. The Court of Appeals concluded that while the union and the company had discussed "the rights of employees to be employed at the French Lick plant," a specific discussion of "seniority status" had not occurred and, therefore, the dispute was not arbitrable because the precondition to arbitration had not been satisfied during the term of the contract.

In its *per curiam* reversal of the Seventh Circuit's *Piano Workers* decision, the Supreme Court cited two cases: *Steelworkers* v. *American Manufacturing Co.* and *John Wiley & Sons, Inc.* v. *Livingston*. The Company submits that the Court's citation of these cases demonstrates that the *Piano Workers* case is inapposite to the case at bar. *American Manufacturing Co.* was cited by the Supreme Court to demonstrate that the Seventh Circuit's holding that there had been no violation of the labor contract was improper because in *American Manufacturing Co.*, the Supreme Court had stated that the "courts . . . have no business weighing the merits of the grievance." *Steelworkers* v. *American Manufacturing Co.*, *supra*, 363 US at 568. In *Piano Workers*, the Court cited *Wiley* because in *Wiley* the Supreme Court held that whether procedural preconditions to arbitration had been satisfied was an issue to be decided by the arbitrator; the Seventh Circuit's finding that the "difference" concerning the reemployment rights of the employees had not been processed through earlier steps in the grievance procedure before

the demand for arbitration (thus precluding arbitration) was an invasion of the province of the arbitrator, contrary to the ruling in *Wiley* that the issue as to whether procedural preconditions to arbitration were satisfied was an issue to be decided by the arbitrator.[10]

In *Piano Workers* and in *Wiley*, there was never any question that the initial and fundamental disputes arose during the terms of the contracts because of actions taken by the companies during the term of the labor contract.[11] In the instant case, the Union does not contest that the events giving rise to the grievance all occurred after the Union had exercised

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10. Wiley argued "that since Steps 1 and 2 have not been followed, and since the duty to arbitrate arises only in Step 3, it has no duty to arbitrate this dispute." *John Wiley & Sons, Inc.* v. *Livingston, supra*, 376 US at 556. The Seventh Circuit in *Piano Workers* erroneously accepted a similar argument while this Court had stated that such issues were to be decided by an arbitrator.

11. The union petitioned for a writ of certiorari to review the Seventh Circuit's opinion in *Piano Workers* and in the petition the union stated the issue as follows:

> "Must not a court direct arbitration of the question of reemployment rights of employees under a collective bargaining agreement which provides for arbitration of any 'difference' and which requires laid off employees to be reemployed within two years of layoff, where the company transferred the location of its plant, laid off and did not recall its employees, considered new job applicants at the relocated plant—*all during the term of the contract*—but did not resume actual production with the new employees at its new location until nine days following the contract's expiration." *Piano and Musical Instrument Workers Union* v. *W. W. Kimball Co.*, 239 F Supp 523, 524 (ND Ill, 1965). (Emphasis added)

In other words, the issue before the Court on the petition demonstrated that the facts underlying the grievance arose prior to the contract—regardless of what the Seventh Circuit felt about the scope of the parties' pre-arbitration grievance meetings. The Sixth Circuit correctly noted that the dispute in *Piano Workers* arose before the expiration of the contract. *IAM Local Lodge 2369* v. *Oxco Brush Division, supra*, 517 F 2d at 243.

its right to terminate and cancel the collective bargaining agreement, including the arbitration provisions therein. Thus, neither *Piano Workers* nor *Wiley* constitutes an exception to the existing, fundamental principle stated in *Wiley* that a party "cannot be compelled to arbitrate if an arbitration clause does not bind it at all." *John Wiley & Sons* v. *Livingston, supra*, 376 US at 547.

CONCLUSION

The order of the Court of Appeals should be reversed and the case should be remanded with instructions to reinstate the judgment of the District Court (A. 46).

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1198

NOLDE BROTHERS, INCORPORATED,
Petitioner,

v.

LOCAL NO. 358, BAKERY & CONFECTIONERY WORKERS UNION, AFL-CIO,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1198

NOLDE BROTHERS, INCORPORATED,
Petitioner,

v.

LOCAL NO. 358, BAKERY & CONFECTIONERY WORKERS UNION, AFL-CIO,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENT

QUESTION PRESENTED

Should an arbitrator decide all claims asserting that the labor agreement required payment of severance pay accrued during the contract term where the parties had agreed to an all-encompassing arbitration provision or must a court decide such claims when the company terminated the employees following contract expiration?

STATEMENT OF THE CASE [1]

1. The Applicable Collective Bargaining Agreement

Petitioner company and Respondent union were parties to a collective bargaining agreement entered into on July 28, 1970. The agreement contained provisions relating to such matters as seniority, holidays, vacations, hours of work and overtime, insurance, authorized absences, and wages. The Article on Wages (Article IX) provided for severance pay upon the closing of the bakery for each employee actively employed for at least three years.

The agreement provided a comprehensive procedure for resolving disputes culminating in binding arbitration in the event that "any grievance" could not be satisfactorily resolved. The arbitration clause further provided that ". . . during arbitration there shall be no strikes, lockouts, boycotts or any stoppages of work." The agreement was to remain in effect until July 21, 1973 ". . . and thereafter, until a new Agreement . . . has been consummated and signed, or this Agreement, after the expiration date, has upon seven days written notice been cancelled or terminated by the Local Union . . . or the Employer." A. 35.

2. The Events Which Gave Rise to This Case

On May 16, 1973, the union advised the company pursuant to Section 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d), of its desire to negotiate certain changes in the terms of the existing contract.

[1] "P. Br." will refer to Petitioner's brief in this Court. In order to conform to Petitioner's method of citation, the decisions of the courts below will be cited as P.A., which refers to pages in the petition for writ of certiorari.

A. 38. After three months of unsuccessful negotiations, on August 20, 1973, the union notified the company in writing of its decision to cancel the current collective bargaining contract, as was its right under Article XIX. A. 41-42. No other action was taken by either party, and the employees represented by the union continued to work thereafter under the terms and conditions of employment specified in the contract. A. 45.[2]

The parties met again on August 31, 1973. At that time, the union negotiators informed the company that the employees had voted to reject a company proposal to extend the contract for another six months, and that the union would strike if necessary to enforce its contract demands. The company then advised that it would close the plant permanently that very night. A. 44-45.

The employees were thereupon notified of the closing by telegram, and operations terminated shortly after midnight of August 31, 1973. At the union's insistence, the employees were subsequently paid wages and certain accrued benefits, including vacation pay, earned and due as of August 27, 1973. They were also paid wages due for work performed between August 27, 1973, and the permanent closing date of August 31,

[2] The union's explanation of the purpose of the seven-day cancellation provision is uncontradicted. Its Business Agent indicated that the provision was included in the agreement at the company's request to enable it to prepare for "any possible strike"—*e.g.*, by disposing of refrigerated merchandise. He also stated that it was the parties' past practice—and their intention in including this particular provision—to "continue the wages, hours and working conditions specified in the expired collective bargaining agreement so long as the employee continues to work during negotiations for a new agreement." (A. 45)

1973. However, the company adamantly refused to pay severance pay to which the union claimed long-term employees had earned under the wage provision of the agreement. The company claimed that the union had "nullified the entire contract", and that termination had extinguished the employees' right to severance pay and precluded arbitration of the union's claim. A. 8.

3. The Union's Claim

The union claimed that the severance pay clause provided accrued or vested rights that permitted employees to earn financial protection during the contract term. Under the union's view of the contract, the affected employees accrued severance pay by working during the contract term and were entitled to receive those earned benefits whenever layoff occurred. Long-term employees, those with three or more years of service, had thus obtained a cushion against the devastating impact of unemployment. The fact that the company might choose to close the plant following the expiration of the collective agreement rather than during its term could not strip these employees of the financial security they had earned.

The parties' clear intention to provide a vested or accrued right here is demonstrated by the fact that the severance pay provision was included in the article entitled "Wages." A. 31. This fact, in itself, strongly suggests that the parties deemed severance pay to be part of the employees' "wages" which, once earned by services performed during the term of the agreement, must be paid even after the agreement expired. The agreement in this case contains no language indicating that severance pay wou'd not be payable in the event

of a shutdown or layoff occurring after the agreement expires. The absence of such a provision is particularly striking in view of the fact that the agreement does contain a provision, Section 6 (A. 31), specifying other circumstances in which severance pay would not be payable. Similarly, the fact that severance pay was to be paid only to employees who had three or more years service also demonstrates that the right was vested or accrued in nature. Since the agreement was for three years, new employees could not possibly meet the conditions of entitlement during the contract term.

4. The Decisions of the Courts Below

In the union's subsequent action under 29 U.S.C. § 185, the District Court addressed the substantive question of whether the employees had a contractual right to severance pay and "reject[ed] the union's major premise that the severance pay issue constitutes an 'earned' or 'vested' right." P.A. 30. Having decided the merits of the contract dispute, the court found it "unnecessary to decide the question whether the plaintiff's right to arbitrate the severance pay issue survived the expiration of the contract—there being no severance pay issue to arbitrate." P.A. 32.

The Fourth Circuit unanimously reversed the refusal to enforce Nolde's agreement to arbitrate. The court concluded that ". . . the district court approached the issues backwards when it first determined whether the company's obligation for severance pay survived the contract." P.A. 4.[3] The

[3] The intention of the parties is critical and not the word used to describe the nature of the union's claim; vested or accrued rights, deferred wages, etc. are merely shorthand as the court below indicated. See P.A. 4-5.

company had agreed to an "all-encompassing" arbitration provision and the Court of Appeals noted that "[t]he company does not deny that the contract by its terms contemplated arbitration of *any* dispute over severance pay." (Emphasis supplied). P.A. 10. The court concluded that " . . . a dispute that turns on whether parties intended certain accruable rights to be enjoyable, even after contract expiration, must be arbitrated if the contract provided for arbitration of such disputes, even if the contingency giving rise to the dispute itself transpired after expiration of the contract." P.A. 9.[4]

SUMMARY OF ARGUMENT

I

An arbitrator should decide all claims asserting that the labor agreement required payment of severance pay accrued during the contract term where the parties have agreed to a broad arbitration clause. A court should refer all claims assertedly governed by the contract to arbitration rather than deciding the merits—the court may not decide such claims, even when the employer had terminated the employees following contract expiration. Since the parties had voluntarily agreed upon an "all-encompassing" arbitration clause and the union had asserted a claim based on the contract, the Court of Appeals correctly held that the

[4] The Court of Appeals was unanimous in concluding that the matter be referred to arbitration and the propriety of referral was the sole question on which certiorari was granted. Judge Widener concurred on referral but dissented on the scope of the arbitrator's authority to consider arbitrability following referral. P.A. 14. This brief will not address the issue that concerned Judge Widener since certiorari has not been granted on that question.

District Court had erred by deciding the merits of the controversy. The union's claim that the severance pay provision conferred an accrued right surviving expiration is clearly one ". . . which on its face is governed by the contract," and the nature of the claim asserted is decisive. *United Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564, 568 (1960).

The decision that this claim was arbitrable was based on the parties' "admittedly broad" agreement to arbitrate, not upon a notion that the obligation to arbitrate is created solely by operation of law. The court properly concluded that the " . . . contract by its terms contemplated arbitration of any dispute over severance pay." P.A. 10. That the union's claim may have been made after the expiration date of the agreement is not controlling since the parties demonstrated no intention to remove the resolution of disputes regarding rights accrued during the term but arising after expiration from the broad provision for arbitration.

This Court's decisions enunciating the presumption of arbitrability confirm the conclusion that an arbitrator and not a court should decide this controversy regarding accrued contract rights. The unanimous decisions in *John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (1964) and *Piano and Musical Instrument Workers* v. *W. W. Kimball Co.*, 379 U.S. 357 (1964) are dispositive. Justice Harlan's opinion for a unanimous court in *Wiley* explicitly holds that there is an obligation to arbitrate disputes over claims for rights that were not to be realized until "after the agreement had expired." 376 U.S. at 555. *Wiley* is clearly controlling since the severance pay claims that this Court held arbitrable there are identical to the claims the union seeks to arbitrate here. In *Piano Workers*, this

Court summarily reversed the denial of arbitration for claimed contract violations that arose after the contract expiration date.

It cannot be argued seriously that the expiration or termination of this labor contract totally extinguished the agreement to arbitrate claims based upon that contract. That argument is foreclosed by precedent, *see, e.g., United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) and defies common sense. Suits to compel arbitration commenced but not finally decided prior to expiration would be converted into claims requiring judicial inquiry on the expiration date; parties who patiently sought to compromise would lose their right to arbitration because they did not file suit before expiration. There is an incontrovertible contractual obligation to arbitrate in those situations; necessarily there is an obligation to arbitrate claims regarding accrued rights arising after expiration as well. For no provision of the collective agreement differentiates, by its terms, between post-expiration arbitrability of such claims when they arise after expiration rather than before. Before the Fourth Circuit, the company had explicitly conceded the controlling legal principle—that termination did not end the parties' commitment to arbitrate disputes over accrued rights. Petitioner's argument there that the union's present claim was arbitrable "only if the right to severance pay otherwise survived the term of the contract[,]" reveals that Petitioner has confused the merits of the union's severance pay claim with its arbitrability.

II

Reversal would impair the previously unchallenged national labor policy favoring arbitration. It would raise questions as to the present vitality of the long-

standing national policy favoring arbitration and would entangle the judiciary in renewed litigation concerning interpretation of agreements to arbitrate. Requiring courts rather than arbitrators to decide the substantive issues burdens the courts with minute controversies and denies the parties the benefits of dispute resolution by skilled labor arbitrators. Such changes in forum create the danger, realized here, of judicial decisions on the merits contrary to the overwhelming arbitral view. Reversal will increase the possibility of industrial strife by complicating already difficult labor negotiations. Negotiators who have rightly relied upon the availability of arbitrators to fill the interstices of their simply phrased documents would be compelled to obtain far more complex and intricate agreements. The need for voluminous agreements that may prove incomprehensible to laymen would increase the possibility of economic strife. If arbitration is not available in these cases, then strikes over accrued rights may not be enjoined in the federal courts and would be lawful under many agreements. *Buffalo Forge Co.* v. *Steelworkers*, 44 U.S.L.W. 5346 (U.S. July 6, 1976).

III

Petitioner's arguments that the court below violated the policy against compulsory arbitration cannot withstand analysis since the company *voluntarily* agreed to arbitrate " . . . any issue of its obligation for severance pay." P.A. 10 Petitioner inaccurately accuses the court below of "judicially rewriting the parties' arbitration agreeement . . .", P. Br. 18, but in effect urges this court to commit the very error it improperly assigns to the Fourth Circuit. Providing Nolde with a judicial limitation upon its comprehensive agreement

to arbitrate would itself be an improper "rewriting" of the agreement.

No labor policy established in an unfair labor practice context, P. Br. 14, 15, is "completely at odds," *Howard Johnson Co.* v. *Hotel Employees*, 417 U.S. 249, 261 (1974), with the ruling of the court below. The sole Labor Board case cited by Petitioner, P. Br. 11-13, dealt exclusively with the nature of the *bargaining* obligation under Section 8(a)(5), 29 U.S.C. § 158 (a)(5), and has no bearing on the appropriate interpretation in a § 301 suit of contractual obligations to arbitrate claims concerning accrued rights. And, finally, Petitioner's contention, P. Br. 14-15, that the policy favoring arbitration does not apply since there is no "existing" collective bargaining agreement merely assumes the conclusion on the merits of the union's claim.

ARGUMENT

I. THE PARTIES AGREED TO AN ALL-ENCOMPASSING ARBITRATION CLAUSE AND INTENDED THAT AN ARBITRATOR, RATHER THAN A COURT, RESOLVE ALL CLAIMS FOR ACCRUED RIGHTS GOVERNED BY THE CONTRACT

a. The Court Below Properly Concluded That the Company Had Agreed To Arbitrate Any Dispute Over Severance Pay Provisions of the Labor Contract

An arbitrator should decide all claims asserting that the labor agreement required payment of severance pay accrued during the contract term where the parties have agreed to a broad arbitration clause. A court should refer all claims assertedly governed by the contract to arbitration rather than deciding the merits—the court may not decide such claims, even when the employer

had terminated the employees following contract expiration. The court below properly held that the parties had intended that an arbitrator should resolve "any dispute over severance pay." P.A. 10. Since the company and union had agreed to an "all-encompassing" arbitration clause and the union had asserted a claim "governed by the contract," the Court of Appeals correctly concluded that the District Court had erred by deciding the merits of the controversy. That conclusion is mandated by the admittedly broad agreement of the parties to arbitrate; the "now well-known presumption of arbitrability," *Gateway Coal Co.* v. *Mine Workers*, 414 U.S. 368, 377 (1974); and this Court's holdings that all claims to accrued rights "governed by the contract" are arbitrable.

The union's claim that the severance provision conferred an accrued right surviving expiration is clearly ". . . a claim which on its face is governed by the contract," and the nature of the claim asserted is decisive. *United Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564, 568 (1960). The union argued that the severance pay clause provided long-term employees the opportunity to accrue wage rights that could survive the termination of the contract.[5] The union characterized its claim as one for "deferred wages" and argued that the long-term, often elderly, employees involved here were protected against the potential financial catastrophe of a layoff whenever it occurred. In its brief to the court below, Petitioner contended that the

[5] The Union's position on the merits was consistent with the overwhelming view of labor arbitrators that severance pay is an accrued right which survives termination, and was strengthened by the fact that severance pay was characterized as "Wages" in the agreement. A. 31. See cases cited pp. 25-26, *infra*.

severance pay provision here did not survive while agreeing that arbitration would be appropriate despite termination if an accrued right were involved.[6] *American Manufacturing* requires arbitration if the *claim* asserted, whatever its merit, is based on the contract, 363 U.S. at 568, and the court below therefore properly concluded that the severance pay claim was arbitrable.

The Court of Appeals correctly described the arbitration clause here as "all-encompassing," for the clause had no limitations or exclusions whatever. Petitioner has conceded that its agreement to arbitrate is "admittedly broad."[7] Indeed, the arbitration clause here provides even greater scope for arbitration than the "standard form" provision referred to by this Court in *United Steelworkers* v. *American Mfg. Co., supra*[8] and Nolde undertook the obligation to arbitrate with knowledge of the "now well-known presumption of arbitrability." *Gateway Coal Co.* v. *Mine Workers, supra.*

The decision of the court below that this claim was arbitrable was thus based on the parties' comprehen-

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[6] Brief for Appellee Nolde; p. 7. The company contended that a claim for severance pay could be arbitrable "if the right to severance pay otherwise survived the contract." Brief, p. 7. That statement confuses the merits of the union's claim with its arbitrability. See pp. 22-23 *infra.*

[7] Petition for Rehearing before Fourth Circuit, p. 3.

[8] "Any disputes, misunderstandings, differences or grievances arising between the parties as to the meaning, interpretation and application of the provisions of this agreement, which are not adjusted as herein provided, may be submitted to the Board of Arbitration for decision. . . .

"The arbitrator may interpret this agreement and apply it to the particular case under consideration but shall, however, have no authority to add to, subtract from, or modify the terms of the agreement." 363 U.S. at 565, n. 1.

sive agreement to arbitrate, not upon a notion that the obligation to arbitrate is created solely by operation of law. No non-contractual obligation was imposed upon the company. Severance pay claims were intended by the parties to be processed through the arbitration machinery in the same fashion as all other contract claims and not subjected to time-consuming and costly court adjudication.

Indeed, as the Fourth Circuit noted,

> "The company does not deny that the contract by its terms contemplated arbitration of *any* dispute over severance pay. Thus it is clear that the company literally agreed to arbitrate *any* issue of its obligation for severance pay." (Emphasis supplied) (P.A. 10).

That the union's claim may have been made after the expiration date of the agreement is not controlling, since the parties demonstrated no intention to remove the resolution of disputes regarding accrued rights arising after expiration from the broad provision for arbitration.

b. This Court's Decisions Require Rejection of Petitioner's Contentions

The undeviating decisions of this Court supporting arbitration confirm the propriety of the conclusion that an arbitrator and not a court should decide this contract controversy. In *United Steelworkers* v. *Warrior & Gulf Nav. Co.* 363 U.S. 574 (1960), and consistently thereafter, this Court has emphasized the presumption of arbitrability in the strongest language imaginable:

> "(a)n order to arbitrate the particular grievance shall not be denied unless it may be said with

> positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." 363 U.S. 582-583.
>
> "In the absence of any express provision excluding the particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim can prevail . . ." 363 U.S. at 584-85.

Here, of course, there is no ". . . evidence of a purpose to exclude the claim . . ." *Id.*

The unanimous decisions in *John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (1964), and *Piano and Musical Instrument Workers* v. *W. W. Kimball Co.*, 379 U.S. 357 (1964) are dispositive. In *Wiley* the union sought arbitration of its claim that a successor employer (Wiley) was obligated to abide by the severance pay and other provisions of its predecessor's (Interscience) contract—including those arising after the Interscience agreement expired. Wiley argued that neither it nor Interscience was required to arbitrate claims which "relate to a period beyond the limited term of the agreement." 376 at 554. Justice Harlan rejected the contention that the obligation to arbitrate expired with the contract. Writing for a unanimous Court, he held that Wiley was obligated to arbitrate the union's claim that the employees had contractual rights to severance pay that could be realized after expiration of the agreement:

> "It is true that the Union has framed its issues to claim rights not only 'now'—after the merger but during the term of the agreement—but also after the agreement expired by its terms. Claimed rights during the term of the agreement, at least, are unquestionably within the arbitration

> clause; we do not understand Wiley to urge that the Union's claims to all such rights have become moot by reason of the expiration of the agreement.[8] As to claimed rights 'after January 30, 1962,' it is reasonable to read the claims as based solely on the Union's construction of the Interscience agreement in such a way that, had there been no merger, Interscience would have been required to discharge certain obligations notwithstanding the expiration of the agreement.[9] *We see no reason why parties could not if they so chose agree to the accrual of rights during the term of an agreement and their realization after the agreement had expired.*
>
> * * * * * * * *
>
> "Whether or not the Union's demands have merit will be determined by the arbitrator in light of the fully developed facts. It is sufficient for present purposes that the demands are not so plainly unreasonable that the subject matter of the dispute must be regarded as nonarbitrable because it can be seen in advance that no award to the Union could receive judicial sanction." (Emphasis supplied.) 376 U.S. at 554-555.

Justice Harlan's opinion for a unanimous Court thus explicitly holds that there is an obligation to arbitrate disputes over claims for rights that were not to be realized until "after the agreement had expired." 376 U.S. at 555.[9] Wiley was required to arbitrate the union's claim for severance pay and other rights that were to be realized "after January 30, 1962," the expiration date of the contract. Like the union in *Wiley*, the union here claimed that the employer is

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[9] Petitioner's contention that *Wiley* is limited to the successorship question, P. Br. 19-20, approaches the disingenuous. Justice Harlan's opinion discussed the arbitrability of accrued rights in a separate section of the opinion demarcated and numbered as such.

"required to discharge (severance pay) obligations notwithstanding the expiration of the agreement." *Id.*

Wiley is clearly controlling since the contractual claims that this Court required to be arbitrated were identical to the contractual claims the union sought to arbitrate here. Nolde's refusal to address that portion of the *Wiley* opinion decisive of the instant case is a startling admission of weakness since both the Court of Appeals and the union quoted and relied upon it.[10]

In *Piano and Musical Instrument Workers* v. *W. W. Kimball Company*, 379 U.S. 357 (1964) this Court summarily reversed the Seventh Circuit's denial of arbitration of claimed contract violations that arose after the contract expiration date. There the union sued to compel arbitration of its claim that employees had seniority rights that entitled them to be hired at a new plant opened by the employer subsequent to the expiration date of the collective bargaining agreement. The Seventh Circuit had denied arbitration on the express finding that the contract dispute "arose *after* October 1, 1961, when the contract in this case expired." (Court's emphasis). *Piano & Musical Inst. Wkrs. U. Local 2549* v. *W. W. Kimball Co.*, 333 F.2d 761, 765 (1964). This Court reversed, citing *United Steelworkers* v. *American Mfg. Co., supra,* and *Wiley.*

Petitioner provides an extended but unpersuasive exegesis of *Piano Workers* devoted to the proposition that the dispute over the right to be hired at the new plant arose prior to the expiration of the contract.[11]

[10] P.A. 5; Respondent's Brief in Opposition to Petition for Certiorari, p. 3; Brief for Appellant to Fourth Circuit, p. 14.

[11] See *Local No. 595 IAM* v. *Howe Sound Co.*, 350 F.2d 508 (3d Cir. 1965) and discussion at pp. 29-30.

Since the employer's denial of the union's seniority claim in *Piano Workers* took place *after* the termination of the collective bargaining agreement, the employer's conduct there was analytically no different from Petitioner's refusal here to pay severance benefits following termination. The Seventh Circuit's central finding that no dispute *"arose"* during the contract term, was identical to Petitioner's present contentions.[12] There was no legally cognizable contract violation in *Piano Workers* until the employer commenced operation on October 9, 1961 with employees lacking seniority.

This Court's reversal of the Seventh Circuit's refusal to require arbitration was clearly predicated upon the quintessential logic of *Wiley*—that arbitration is the appropriate mechanism to resolve controversies arising after the expiration of a contract when those controversies concern rights allegedly accrued during the term of the agreement. The Court found it unnecessary to elaborate on the question the Seventh Circuit had deemed critical—when the dispute arose—because that question was simply not of controlling significance in deciding the appropriate forum for resolution of disputes regarding accrued rights.

Wiley and *Piano Workers* refute Nolde's contention that arbitration is appropriate where a party, as in *Wiley,* has sought a declaratory judgment as to the

[12] Petitioner continues its studied ignorance of *Wiley's* accrued rights analysis and suggests that the citation of *Wiley* in *Piano Workers* was intended to deal with procedural arbitrability. That is hardly likely since the Seventh Circuit had denied arbitrability on Nolde's theory here that the claim arose after expiration; the procedural arbitrability issue was mere dictum. If this Court were dealing only with the question of procedural arbitrability, it would not have ordered arbitration of a dispute that arose after expiration and hence was not arbitrable.

post-expiration impact of the agreement a week before expiration but inappropriate when, as in *Piano Workers* and here, an identical contractual determination is sought shortly after the expiration of the agreement. Those opinions cannot be interpreted as necessitating different tribunals for identical contract questions. Arbitrability cannot rest on the union's patience or its capacity to divine the employer's intention before the contract expires.[13] Parties who agree upon arbitration as the mechanism to resolve disputes do not intend such illogical results.

The hostility to forum shopping expressed in *Howard Johnson Co.* v. *Detroit Local Joint Board, Hotel & Restaurant Employees,* 417 U.S. 249 (1974), also rebuts Petitioner's argument that different forums, court and arbitrator, must decide identical questions regarding the right to severance pay. Acceptance of Nolde's argument could permit the rights enjoyed by a party " . . . to depend upon the forum in which it presses its claims." 417 U.S. at 256. Petitioner would require arbitrators to decide contract questions regarding accrued rights where a declaratory judgment action is brought prior to expiration, but a court to decide those same contract issues when suit is commenced after expiration. That result comports with

[13] Under Petitioner's theory of *Wiley,* a union that patiently sought to compromise its disagreements over accrued rights with the employer would lose its right to arbitrate if it failed to bring suit prior to expiration. A union that acted precipitately would preserve its rights. *Wiley* cannot be read as requiring suits that are costly and exacerbating to the parties be instituted before an already inundated judiciary.

neither the parties' intentions nor federal labor policy as clearly established in the decisions of this Court.[14]

c. Termination Does Not Extinguish the Obligation To Arbitrate Claims for Accrued Rights

It cannot be argued seriously that the expiration or termination of this labor contract totally extinguished the agreement to arbitrate claims for accrued rights based upon that contract. There is no contractual support for Petitioner's distinction between the arbitrability of such claims arising before the expiration date and those arising after the expiration date. The labor agreement comprehensively provides for arbitration of "all grievances" without regard to the date they arise. Nor is there any evidence that in negotiating their "admittedly broad" and "all-encompassing" agreement to arbitrate the parties intended to withdraw contract disagreements first arising in the post-expiration period from the normal method of dispute resolution.

If it is to rely upon the agreement's termination clause, Petitioner must argue that termination of the agreement completely eradicates the obligation to arbitrate any claims whatsoever. But that

[14] The analysis of the successor issue in *Howard Johnson* does not disturb the controlling authority of *Wiley* and *Piano Workers* on questions concerning accrued rights. The party against whom arbitration was sought (Howard Johnson) had never signed a contract and there was ". . . no express or implied assumption of the agreement to arbitrate . . . ." 417 U.S. at 264. In contrast, Petitioner here had expressly agreed to arbitrate. Grissom, the seller in *Howard Johnson,* had agreed to arbitrate. And, since only Nolde is involved, an order to arbitrate does not violate any countervailing public policies supporting the free transfer of capital, or a buyer's right not to hire the seller's employees. *Cf.* 417 U.S. at 255, 262.

argument was foreclosed as early as *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) and *Piano Workers,*[15] is analytically unsupportable and had been expressly abandoned by Petitioner at an earlier stage of this proceeding.[16] In order to avoid these overwhelming difficulties, Petitioner's brief to this Court is purposefully murky as to the contractual predicate for the distinction they seek to draw.

An agreement's expiration for other purposes does not invariably nullify the right to enjoy contract rights vested or accrued during the contract period. Wages earned during the term of the agreement but unpaid prior to its expiration are payable thereafter. Unused vacation pay is frequently payable following expiration. And, should controversies arise regarding the enjoyment of these alleged vested or accrued rights, those controversies are intended to be settled through the arbitral mechanism contained in the agreement rather than court litigation.

The notion that the parties to this or any other collective agreement intend that resolution of disputes be snatched from arbitration and assigned to a court of law following expiration defies common sense. Examples are plentiful. First, it is frivolous to suggest that the parties intend that expiration be denied

[15] In *Enterprise*, the contract expired on April 4, 1957 and suit was not filed until August 22, 1957, see *Enterprise Wheel & Car Corp.* v. *United Steelworkers*, 269 F.2d 327, 329 (4th Cir. 1959); in *Piano Workers*, the agreement expired on October 1, 1961 and suit was commenced on September 14, 1962, *Piano & Musical Inst. Wkrs. U. Local 2549* v. *W. W. Kimball Co.*, 333 F.2d 761, 762-763 (7th Cir. 1964).

[16] See pp. 22-23 *infra*.

if a suit to compel is commenced but not finally decided prior to expiration; the parties do not wish to provide one who successfully delays litigation the right to switch forums on the merits. Second, arbitration must survive expiration even where a suit to compel is not brought until expiration has passed. *United Steelworkers* v. *Enterprise Wheel Co., supra.* No one wishes to punish a party who patiently seeks to compromise the underlying dispute by denying him arbitration if he withholds litigation until after expiration. Third, Petitioner has conceded that the parties intend arbitration of post-expiration suits where admittedly "vested" rights are involved. See pp. 22-23, *infra.* Fourth, *Wiley* makes clear that the parties intend arbitration of claims regarding accrued rights where suit had been commenced prior to expiration.[17]

There is an incontrovertible obligation to arbitrate under this agreement in the situations outlined above, and necessarily there is an obligation to arbitrate claims regarding accrued rights arising after expiration as well. No provision in our agreement differentiates, by its terms, between post-expiration arbitration of such disputes when they arise after expiration rather than before. The obligation to arbitrate disputes over accrued rights was either terminated for all purposes on the expiration date or not at all. Clearly, it was not terminated since the parties evidenced no

[17] The fact that the union terminated the contract is of no consequence. The employer had a correlative right to do so, A. 35, and its position is not enhanced by the fact that it was the union that acted here. Termination and expiration are identical in legal consequence under 29 USC § 158(d). See Comment, *Duty to Arbitrate Severance Pay Survives Termination of Collective Bargaining Agreement Before Closing of Plant*, 89 Harv. L. Rev. 812, 820, n. 56.

intention to tranfer all unresolved disputes to judicial consideration on that date.[18]

Before the Fourth Circuit, the company had conceded the controlling legal principle—that termination of the agreement did not end the parties' commitment to arbitrate disputes over accrued rights:

> "Obviously, where a right had accrued during the term of a contract, such as a vacation earned under the terms of the contract, but not taken, *the right to enforce such a vested right in arbitration arises under the contract and survives its termination.*"
>
> * * *
>
> "It is, therefore, clear that the claim for severance pay did not arise during the term of the expired contract and could be arbitrable, only *if the right to severance pay otherwise survived the term of the contract.*[19] (Emphasis supplied).

Those arguments reveal that Petitioner has confused the merits of the union's severance pay claim with its

[18] Petitioner's contention, P. Br. 7-8, that the court below improperly limited the parties' broad agreement to arbitrate acknowledges the breadth of its agreement to arbitrate. The court below properly limited its decision to claims for accrued rights, P.A. 12-13, since a court may not compel arbitration of claims that are not "governed by the contract," *e.g.*, cases involving discharges after expiration. Decisions of the courts of appeal denying arbitration of claims not predicated upon the old agreement properly support that critical distinction. See, *e.g.*, *M.K.O. Transit Lines, Inc.* v. *Division No. 892*, 319 F.2d 488 (10th Cir. 1963) relied upon by Petitioner in its certiorari petition, pp. 11-12, but abandoned here, where the court expressly distinguished cases involving the terms of a new contract from those where "the sustained arbitration was with reference to accrued though continuing rights under the terminated agreement . . . ." 319 F.2d at 491.

[19] Brief for Appellee Nolde, p. 6-7.

arbitrability. Unused vacation time, the company admits, is an accrued or vested right that survives the term of the contract and hence disputes as to its payment are arbitrable after termination. Even severance pay, the company admits, would be arbitrable if "the right to severance survived the term of the contract."[20]

But the merits of the union's consistent claim that severance pay was intended to survive termination was an issue for the arbitrator and not a court. The claim asserted was "on its face governed by the contract" and arbitration was therefore the appropriate method for resolution.[21]

II. REVERSAL WOULD SIGNIFICANTLY IMPAIR THE HITHERTO UNCHALLENGED NATIONAL LABOR POLICY FAVORING ARBITRATION AND WOULD EMBROIL THE JUDICIARY IN A MULTIPLICITY OF EMPLOYMENT GRIEVANCES

Acceptance of Petitioner's contentions would raise questions as to the present vitality of the long-standing national policy favoring arbitration and would entangle the judiciary in renewed litigation concerning the interpretation of agreements to arbitrate. Moreover, reversal of the court below would require judges to decide the multifarious and often tedious questions that inevitably develop following expiration of a collective bargaining agreement. These problems typically involve narrow, parochial concerns, minute amounts of money and the interpretation of a single

[20] Brief for Appellee Nolde, p. 7.

[21] The views of the most prominent authority in this field clearly support arbitrability of the union's claim. FELLER, *A General Theory of the Collective Bargaining Agreement*, 61 CAL. L. REV. 663, 792-805 (1973).

collective bargaining agreement. The federal courts would become the tribunals to determine the precise amount of severance pay due a worker who had been on leave of absence for a substantial time, whether and how much unused vacation time is due an individual employee after closing, whether a given individual was in fact offered acceptable alternative employment and forfeited his right to severance pay by refusing it and a host of comparable questions.[22]

A decision foreclosing arbitration in the instant case would promote renewed judicial litigation over arbitrability and weaken the previously "unmistakable" [23] policy favoring labor arbitration. In conformity with the *Steelworkers Trilogy* and this court's undeviating subsequent decisions, the lower courts, both state and federal, have generally accorded arbitration the favored position that Congress and this Court have mandated. But if doubt is cast upon the current authority of those precedents, lower courts that had reluctantly abandoned the traditional common-law hostility to arbitration by reason of those precedents would face new temptations. Unquestionably, the lower courts would be inundated with clever and superficially appealing arguments against arbitration; some of those arguments might well succeed. The present clarity of the law would be muddied and the force of the national policy favoring arbitration diluted.

Requiring courts rather than arbitrators to decide these substantive issues would deny the parties the

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[22] The massive volume of potential litigation in these areas was emphasized by this Court in *Buffalo Forge Co.* v. *Steelworkers, supra* (". . . [i]n 1972" more than 21,000,000 workers in the United States were covered under more than 150,000 collective bargaining agreements). 44 U.S.L.W. at 5350, n. 12.

[23] *Buffalo Forge Co.* v. *Steelworkers, supra,* 44 U.S.L.W. at 5351.

benefits of dispute resolution by arbitrators skilled and knowledgeable in labor relation matters. In the *Steelworkers Trilogy* and in an unbroken line of decisions since then, this Court has emphasized the proposition that the arbitrator should decide these matters since he is familiar with "the industrial common law—the practices of the industry and the shop." *United Steelworkers of America* v. *Warrior & Gulf Navigation, supra,* 363 U.S. at 581-583; *Gateway Coal* v. *Mine Workers, supra,* 414 U.S. at 379. In *Buffalo Forge Co.* v. *Steelworkers* this Court reiterated that "the parties have bargained for" resolution of disputes by the arbitrator and not by a court. 44 U.S.L.W. at 5350. As this Court concluded in *Buffalo Forge,* "[t]he parties have agreed to grieve and arbitrate, not to litigate," *Id.*

The very concerns expressed by this Court in *Buffalo Forge* have been realized in this case—a district court lacking familiarity with the industrial common law reached a decision on the merits contrary to the results reached by those arbitrators who have considered the same question. Arbitrators have consistently held that severance pay is an earned right payable whenever the shutdown or layoff occurs, without regard to whether the agreement has expired. For example, in *Brooklyn Eagle, Inc.,* 32 Lab. Arb. 156 (1959), Arbitrator W. Willard Wirtz held that "[t]he fact that the event of dismissal which made the (severance) payments due came after the termination date does not affect the matter." *Id.* at 160.[24]

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[24] Arbitrator Wirtz based his decision on critical factors peculiar to the realities of collective bargaining and noted the disruptive effect of a contrary ruling:

> "It would be more to the point, if it were appropriate to seek out the parties' intent beyond its expression in the words of

The same result was reached in *H. K. Porter Co.*, 49 Lab. Arb. 147 (1967) where the arbitrator concluded that the employees were entitled to severance pay despite the fact that the closing of the plant did not occur until several days after the agreements expired. Note, *Termination of Collective Bargaining Agreements—Survival of Earned Rights,* 54 Northwestern L. Rev. 646, 647 (1959) ("[i]t is almost uniformly held when a severance pay clause is in question that

Section 10 itself to recognize how sharply and with what certainty they would have rejected some of the necessary implications of the interpretation urged here by the Publisher. This position would mean that under such a clause the employer could, in his discretion, control and even defeat the realization of the earned and agreed upon severance benefits by waiting to make dismissals until a contract expired. It would mean, as a practical matter, that this is exactly what would be done in any case where an employer might decide to go out of business.

"Such an interpretation would mean, too, that in any negotiation regarding the renewal of a collective bargaining agreement containing a severance payment provision one of the pressures on the union would be that unless agreement on new contract terms was reached part of the price would be the complete loss of the value of the severance payment rights of all employees based on their years of work already performed. These rights are plainly subject to modification, even elimination, in any new collective bargaining negotiation. But this would be by the action of the representatives of the employees who own them. The idea that having earned them, and owned them, the employees' bargaining position in a new contract negotiation would start again from nothing is not important here from the standpoint of its being inequitable. What is relevant is that this is clearly not the way these obligations and rights would be viewed by the parties. They would view them as obligations and rights covering services already performed, as established by bi-lateral agreement. It would violate such a view completely to suggest that the rights already earned would be wholly destructible at the end of any contract period by a unilateral determination of the employer that he was no longer willing or inclined to make payment on them." *Id.* at 161.

the employer's obligation under that clause continues after the contract terminates.")

Disruption of the previously uniform decisions of this Court enforcing the national labor policy favoring labor arbitration would unduly complicate labor negotiations and increase the possibility of industrial strife. Negotiators have rightly anticipated that arbitration will be available to resolve contractual disputes. The mutual expectation that a skilled labor arbitrator will deal with the controversies that invariably arise have facilitated negotiations. There has been no need for the voluminous and intricate compacts typical of a multi-million dollar financing or real estate transaction because non-lawyer labor negotiators have safely assumed that arbitrators trained in the "law of the shop" will fill in the interstices of their customarily brief and simply phrased documents. Simplicity in drafting is a major consideration for labor agreements which must be applied by workers in the shop and their foremen.[25]

Reversal of the decision of the Court of Appeals would diminish the certainty that an arbitrator will be available to bring "his knowledge of the common law of the shop" and "considerations which are not expressed in the contract as criteria for judgment." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. at 582. Intent upon assuring that they not lose the benefits of their bargaining in protracted and costly litigation before relatively untutored courts, negotiators will seek to protect themselves against disappointments by insisting upon far

[25] *United Steelworkers v. Warrior & Gulf Co., supra,* 363 U.S. at 580.

more complex and intricate contractual provisions. Such necessarily altered bargaining tactics would complicate the already difficult task of consummating labor agreements and increase the possibility of economic strife. Since lengthy lawyers' documents are frequently incomprehensible to laymen, both negotiators and ratifying workers will be reluctant to approve agreements they cannot understand.

Adopting Petitioner's position would increase the risk of strikes and lockouts over contract disputes that arise months after expiration and even those that arise after the successful negotiation of a new agreement. For example, an argument concerning pension rights under an expired agreement would no longer be arbitrable under that agreement; it would not be arbitrable under the new agreement either if the Court accepts Petitioner's argument that arbitration is not appropriate if based in any part on events occurring outside the contract term. Since such a strike would not be one over an arbitrable grievance, it could not be enjoined in a federal court under *Buffalo Forge*. Indeed, since many contracts like the contract here prohibit only strikes "pending negotiation or during arbitration," A. 33, strikes over disputes under the old agreement would be lawful in all respects. *Cf. Buffalo Forge Co.* v. *Steelworkers, supra.* 44 U.S. L.W. at 5350, n. 10.

III. NO COUNTERVAILING FEDERAL POLICY REQUIRES REVERSAL SINCE PETITIONER FREELY UNDERTOOK AN "ADMITTEDLY BROAD" AGREEMENT TO ARBITRATE

Petitioner's arguments that the court below violated the policy against compulsory arbitration cannot withstand analysis since the company voluntarily agreed to arbitrate ". . . any issue of its obligation for severance pay." P.A. 10. The court noted that "[t]he company does not deny that the contract by its terms contemplated arbitration of any dispute over severance pay." *Id.* Nolde bargained for an "admittedly broad" obligation to arbitrate with full knowledge of the "now well-known presumption of arbitrability." *Gateway Coal Co.* v. *Mine Workers, supra.* No outside agency compelled Nolde to undertake that obligation. Having voluntarily done so, it may not now renounce its bargain as compulsory arbitration.

Petitioner inaccurately accuses the court below of "judicially rewriting the parties' arbitration agreement . . . ", P. Br. 18, but in effect urges this court to commit the very error it improperly assigns to the Fourth Circuit. There was no manner in which the court below could rewrite Nolde's agreement to arbitrate to provide greater breadth than the clause the parties themselves had drafted. Providing Nolde with a judicial limitation to its comprehensive agreement to arbitrate would itself be an improper "rewriting" of the agreement. The court below properly refused to carve an exception into the parties' comprehensive agreement to arbitrate.

The decision of the court below is in accord with the better reasoned decisions of other lower courts rejecting contentions similar or identical to those advanced by Petitioner. See, most particularly *Local No. 595 IAM* v. *Howe Sound Co.*, 350 F.2d 508, 511 (3d Cir. 1965), relied upon by the court below. *Cf. United States Gypsum Co.* v. *United Steelworkers of America,* 384 F.2d 38, 44 (5th Cir. 1967). In *Howe Sound,* the court ordered arbitration of the union's claims for vacation pay based on a provision "that an employee who *leaves* the company for any reason should receive pro rata vacation pay within 30 days after his termi-

nation" and for a holiday that was observed thirty days after the closing of the plant and the expiration of the agreement. 350 F.2d at 510. Both claims "arose" after expiration under any conceivable theory but the Court held that fact not controlling:

> Since the Union's claim is founded on the expired agreement it is also bound by the arbitration provision of the agreement, even though the issue may not have been raised until after the expiration of the agreement. 350 F.2d at 511.

The precise issue involved here was decided in favor of arbitrability in *In Re Potoker,* 2 N.Y.2d 553, 141 N.E.2d 841 (N.Y. Ct. App. 1957), *cert. denied* 355 U.S. 883, and *United Steelworkers* v. *H. K. Porter,* 64 LRRM 2202 (W.D. Pa. 1966). A law review comment on the instant case concludes that ". . . arbitration should be preferred to judicial resolution, even after expiration and plant shutdown." Comment, *Duty to Arbitrate Severance Pay Survives Termination of Collective Bargaining Agreement Before Closing of Plant,* 89 Harv. L. Rev., 812, 821 (1976). See also *Monroe Sander Corporation* v. *Livingston,* 377 F.2d 6, 10-11 (2d Cir. 1967).[26]

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[26] *Monroe Sander* specifically addresses the issues involved here; other decisions of the Second Circuit cited by Petitioner do not. See 377 F.2d at pp. 10-11. *Procter & Gamble Ind. U.* v. *Procter & Gamble Mfg. Co.,* 312 F.2d 181 (2d Cir. 1962), cited by Petitioner, is expressly distinguished by *Monroe Sander* and in *Bressette* v. *International Talc Co., Inc.,* 527 F.2d 211, 216 (2d Cir. 1975). *Local 1251, UAW* v. *Robertshaw Controls Co.,* 405 F.2d 29 (2d Cir. 1968) does not deal with arbitrability. *Flight Engineers Int'l Assoc., EAL Chapter* v. *Eastern Air Lines,* 359 F.2d 303 (2d Cir. 1966) expressly notes that an arbitration board ". . . was still the appropriate forum for the assertion of rights which had arisen while the collective bargaining agreement was still in effect. . . . But no such rights are asserted here." 359 F.2d at 310.

These authorities are far better reasoned than the decisions cited by Petitioner, P. Br. 16-17. The decisions of the Sixth Circuit in *I.A.M. Local Lodge 2369* v. *Oxco Brush Division,* 517 F.2d 239 (6th Cir. 1975), and *Local 58, United Rubber, Cork, Linoleum and Plastic Workers, AFL-CIO* v. *Sun Products Corp.,* 521 F.2d 1286 (6th Cir. 1975), are best explained by the fact that the Sixth Circuit found in the union's favor on the merits in reliance on its own strong precedents dealing with the substantive issue of vacation pay. Both decisions accepted the union's argument that vacation pay is actually additional wages for work already performed, 517 F.2d at 243, 521 F.2d at 1288,[27] the very substantive argument advanced regarding severance pay in this case. See pp. 4-5, *supra.* The Sixth Circuit's analysis of arbitrability is unpersuasive and the court does not discuss the strong contrary authority of *Howe Sound* and the decisions noted above. Other cases cited by Petitioner are inapplicable[28] and unpersuasive.[29]

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[27] In *Oxco,* the parties had contractually withdrawn from the arbitrator the authority to award "compensation, damages, or other redress to any employee or the Union." 517 F.2d at 242. Since the employees in *Oxco Brush* sought "compensation" (vacation pay), the arbitrator would have been powerless to resolve the dispute.

[28] The Fourth Circuit correctly distinguished the affirmance without comment in *Milk Drivers Local 246* v. *Thompson Honor Dairy,* 489 F.2d 1272 (D.C. Cir. 1974) as involving negotiation of a benefit not an accrued right. P.A. 13, n. 7. The unreported portion of the District of Columbia Court's memorandum made clear that no contract claim was made, since the company's only obligation was to negotiate. See Brief of Appellant Union to Fourth Circuit, p. 17, n.4.

[29] *OCAW International Union* v. *American Maize Products,* 492 F.2d 409 (7th Cir. 1974), cert. denied, 417 U.S. 969 (1974), involved a lockout following termination and not a claim for accrued rights allegedly surviving that action.

No labor policy established in an unfair labor practice context, P. Br. 14, 15, is "completely at odds," *Howard Johnson Co.* v. *Detroit Joint Board, supra,* 417 U.S. at 261, with the ruling of the court below. No unfair labor practice doctrine demands that a party's agreement to arbitrate be ignored, circumscribed or even narrowly construed in a § 301 suit. The Labor Board has had neither the occasion nor the inclination to interpret agreements to arbitrate. The Board has gone so far as to defer its own processes in order to afford the fullest scope to the federal policy favoring arbitration in a major and highly controversial series of decisions. See, *e.g. Collyer Insulated Wire,* 192 NLRB 837 (1971).

The sole Labor Board case cited by Petitioner, P. Br. 11-13, dealt exclusively with the nature of the statutory duty to bargain under Section 8(a)(5), 29 U.S.C. § 158(a)(5) and has no bearing on the appropriate interpretation of contractual obligations to arbitrate claims concerning accrued rights in a § 301 suit. *Hilton Davis Chemical Co.,* 185 NLRB 241 (1970). There the union conceded *ab initio* that the previous contractual obligation to arbitrate had expired and that the employer was contractually free not to arbitrate. The union argued, however, that the statutory duty to bargain under Section 8(a)(5) made it an unfair labor practice for the employer not to agree to arbitrate in the future, even in the absence of a contract. The Board rejected that union's argument on the ground that imposing such a statutory duty in effect would be requiring the employer to enter into a new contract. Since Section 8(d), 29 US.C. 158(d) makes clear that there is no duty to make a concession, the Board concluded that the duty to bargain in good faith did not

permit it to impose a "statutory obligation to reach agreement" to arbitrate. 185 NLRB at 242.

The Fourth Circuit's conclusion is thus not "completely at odds" with Board law since *Hilton* does not bear upon the union's contention here that there was a freely entered contractual obligation to arbitrate. In contrast to the union in *Hilton,* the union here *does* contend that the employer's earlier contractual obligation to arbitrate covers the disputes in question. Respondent does not argue that Nolde has a nonconsensual duty to arbitrate imposed as a matter of public law under Section 8(a)(5), but rather that Nolde was a consenting party to a binding contract.

Petitioner's contention, P. Br. 14-15, that the policy favoring arbitration does not apply since there is no "existing" collective bargaining agreement assumes the conclusion to be reached. It is premised on the assumption that no substantive rights survive termination of the contract, the very issue to be decided in whichever forum, court or arbitral, is to resolve the parties' controversy. As we have seen, the proposition that *no* contract rights survive the expiration of a collective agreement flies in the face of both reason and precedent. Where, as here, a claim is asserted that is "governed by the contract," that contract is an "existing" agreement and the Congressional policy favoring arbitration applies.[30]

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[30] The legislative history to which Petitioner refers (P. Br. 15) deals with the emergency strike provisions of Taft-Hartley, not the contract arbitration provision of § 203(d). The expressed Congressional reluctance to require the bargainers to accept substantive contract provisions has no applicability to a situation in which a party has agreed to contract arbitration.

CONCLUSION

For the reasons stated, the decision of the court below should be affirmed. If the Court should conclude that the matter is not arbitrable, the case should be remanded to the Court of Appeals for a determination of the merits of the union's claim for severance pay.[31]

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[31] The Respondent union appealed from the District Court's decision on the merits; the Court of Appeals did not reach that question in view of its decision on arbitrability.